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No. 87-2027

In The
Supreme Court of the United States
October Term, 1987

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodard,

Petitioner,

vs.

WESTERN PAVING CONSTRUCTION CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In order to equitably toll federal statutes of limitation pursuant to the doctrine of fraudulent concealment, is it sufficient that defendants have either engaged in wrongdoing which is "inherently self-concealing" or committed affirmative concealing conduct *in the course of* perpetrating the offense, or must they engage in affirmative acts of concealment *in addition to* the substantive violation itself?

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1. *En banc* decision (*per curiam*) of the United States Court of Appeals for the Tenth Circuit, 841 F.2d 1025 (10th Cir. 1988) (vacating prior judgment, withdrawing panel opinion and affirming, by equally divided Court, judgment of District Court). App. 1-2.

2. Panel opinion of the United States Court of Appeals for the Tenth Circuit, 833 F.2d 867 (10th Cir. 1987) (vacated and withdrawn). App. 5-42.

3. Opinion of the United States District Court for the District of Colorado, 630 F.Supp. 206 (D. Colo. 1986) (affirmed). App. 43-55.

JURISDICTION

The *per curiam* decision of the United States Court of Appeals for the Tenth Circuit was entered on March 10, 1988, following an *en banc* rehearing on March 3, 1988. The rehearing was held pursuant to orders of the Tenth Circuit dated December 31, 1987, and January 29, 1988. The instant petition for writ of certiorari is filed within ninety days of the *en banc* Tenth Circuit's issuance of its *per curiam* decision. This Court has certiorari jurisdiction pursuant to 28 U.S.C. sec. 1254(1) (1982).

STATUTES INVOLVED

Sherman Antitrust Act, Section 1, 15 U.S.C. sec. 1, as amended (1982)

Clayton Antitrust Act, Sections 4, 4B, 15 U.S.C. secs. 15, 15b, as amended (1982)

STATEMENT OF THE CASE

This antitrust treble damage action involves alleged participation by respondent Western Paving Construction Co. ("Western Paving" or "Western") in a continuing conspiracy to rig bids in violation of Section 1 of the Sherman Act, 15 U.S.C. sec. 1, as amended (1982). At issue are three road construction projects let by the Colorado Department of Highways ("CDOH") in the 1970's.[1] Because the suit of petitioner State of Colorado (the "State") was not filed for almost ten years after the most recent of the three jobs was let, the tolling of the federal antitrust statute of limitations is critical to this case.

The State obtained at least constructive knowledge of Western Paving's potential involvement in highway bidrigging on July 27, 1983, when federal prosecutors filed a pleading in *United States v. Corn Construction Co.*, [1980-88 Transfer Binder] Trade Reg. Rep. (CCH) para. 45,083 (Case Nos. 3091, 3092) (D. Colo. June 14, 1983), a criminal bidrigging action.[2] That document, entitled "Government's List of Prior Similar Acts of Defendants," identified a number of highway construction projects let by CDOH from 1969-78 as having been either rigged or at least the subject of bidrigging discussions. It listed re-

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[1]The Colorado Department of Highways ("CDOH") road construction projects at issue in this action are as follows: the 1971 Newcastle Easterly job, No. 170-1(32)105, let January 7, 1971; the 1973 Lamar-East project, No. C17-0050-02, let March 15, 1973; and the 1974 Parker Road job, No. C47-0083-09, let August 29, 1974.

[2]Respondent Western Paving was not among the defendants indicted for conspiring to rig bids on Colorado highway construction projects within the 5-year criminal statute of limitations prescribed in 18 U.S.C. sec. 3282 (1982).

spondent Western Paving as a bidder on two of the projects.[3]

Subsequent to the completion of the criminal antitrust litigation in *Corn Construction Co.*, the State filed a civil antitrust case against Corn in federal court, along with a consent settlement. *Colorado ex rel. Woodard v. Corn Construction Co.*, 1984-1 Trade Cas. (CCH) para. 65,812 (D. Colo. Jan. 10, 1984). Pursuant to that settlement, during the first half of 1984 defendants in the *Corn* action cooperated with the State by making disclosures regarding bidrigging on CDOH projects.[4] Included in the information provided by the *Corn* defendants was evidence implicating Western Paving in bidrigging on a highway construction project let by CDOH.

Based on the foregoing and other information, the State filed its complaint in the instant action on July 19, 1984, seeking treble damages. *See* Clayton Act Section 4, 15 U.S.C. sec. 15, as amended (1982). The suit alleged Western Paving's involvement in a continuing conspiracy to rig bids on CDOH projects in the time period 1971-78.[5]

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[3]The two "prior similars" on which Western Paving was a bidder were the 1971 Newcastle Easterly project, *see supra* n. 1, and the 1978 Interstate 85 West, Douglas County, project, No. MP-47-0067-06.

[4]In addition to cooperating with the State, the defendants in the *Corn* civil action paid $250,000 in resolution of the State's claims in the litigation, accepted imposition of a permanent injunction, and were subject to certain compliance and reporting requirements for a period of four years.

[5]In line with the prosecution's "prior similars" list in the *Corn* criminal case, and based on additional separate pre-filing investigation by the State, the 1978 Interstate 85 West, Douglas County, job, *see supra* n. 3, initially was alleged to have been rigged. However, post-filing discovery failed to substantiate

(Continued on following page)

The complaint also alleged that Western Paving and its co-conspirators fraudulently concealed the conspiracy, thereby equitably tolling the four-year federal antitrust statute of limitations. *See* Clayton Act Section 4B, 15 U.S.C. sec. 15b, as amended (1982).

Following a period of discovery, the parties filed cross-motions in the trial court seeking summary judgment. Western Paving sought dismissal of the State's suit as time-barred, on the ground that the doctrine of fraudulent concealment was inapplicable. The sole contention advanced by Western in this regard[6] was that the "fraudulent means" prong of the fraudulent concealment doctrine necessitates a showing of "affirmative acts" of concealment, which requirement the State could not meet.[7]

The State, on the other hand, sought a ruling that fraudulent concealment was conclusively established. The State urged that it need not show affirmative acts of concealment at all, because the conspiracy alleged was "inherently self-concealing" in nature. Nevertheless, if af-

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that belief. Accordingly, the State ultimately dropped the project from the litigation. Meanwhile, two other projects, the 1973 Lamar-East and the 1974 Parker Road jobs, *see supra* n. 1, were discovered to have been rigged and were added to the litigation.

[6]Western Paving also sought dismissal of the State's suit on the basis that it had been filed in violation of Fed. R. Civ. P. 11. The District Court rejected this contention. *See* App. 53-54. The initial opinion, by the Tenth Circuit panel, affirmed the lower court on this point. App. 38-39. Western Paving did not seek rehearing on the Rule 11 issue.

[7]Western Paving did not argue that the State failed to meet either the "concealment/non-discovery" or "due diligence" prongs of the fraudulent concealment test. Specifically, Western has never asserted that the State discovered its claim more than four years prior to the filing of suit or that the State was in any way negligent in not discovering its claim and filing suit sooner than it did.

firmative acts were necessary, the State asserted that it had established them in the case at hand.

The District Court resolved the parties' cross-motions by granting summary judgment for Western Paving and denying it to the State. The lower court utilized a multi-step analysis in arriving at its decision.

Initially, the trial court reasoned that there is a "more stringent" test for applying the fraudulent concealment doctrine to toll the statute of limitations in antitrust actions than in fraud cases. App. 46. Thus, the court specifically rejected the concept that an "inherently self-concealing" wrong may suffice to toll the antitrust statute of limitations under the fraudulent concealment doctrine. *See* App. 48-49 & n. 3.

Instead, the trial court ruled that "affirmative acts of concealment" are necessary to toll the statute in antitrust cases. It reasoned that such acts may not be those "taken in carrying out the conspiracy itself"; rather, they must be "*affirmative* steps *in addition to* the original wrongdoing to prevent the plaintiff from discovering the wrong." App. 51-52 (emphasis added). The District Court concluded that, for two reasons, the acts relied upon by the State are not *affirmative* acts of *concealment.* First, the lower court characterized certain of the acts as either mere failures to disclose or denials of wrongdoing—essentially as being passive rather than affirmative. Second, the trial court categorized other of the acts in question as having been taken in the course of perpetrating the wrong rather than having been undertaken in addition to it. *See* App. 49-52.

On appeal by the State, a panel of The United States Court of Appeals for the Tenth Circuit reversed the Dis-

trict Court's grant of summary judgment in favor of Western Paving. The Tenth Circuit panel then directed that the case be remanded for trial.

Initially, the panel majority[8] agreed with the lower court's contention that, in order to qualify as "affirmative acts of concealment," *affirmative* conduct *in addition to* the original wrong must be undertaken to prevent the plaintiff from discovering the violation. The majority reasoned that even though acts which are *part of* the original wrong may serve to conceal it, they are acts of perpetration rather than acts of concealment. Consequently, the panel majority agreed with the trial court that all the acts relied on by the State either were mere denials or silence and so were not affirmative, or they were acts taken in carrying out the violation itself and so did not constitute concealment. Thus, the majority concluded that the State had shown no *affirmative* acts of *concealment*. *See* App. 26-28.

Notwithstanding the preceding, the panel majority diverged from the District Court by ruling that an "inherently self-concealing" wrong could suffice in place of affirmative acts of concealment to toll the statute of limita-

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[8]Judge Anderson filed a separate opinion concurring in the result, which he viewed as being compelled by the Tenth Circuit's prior decision in *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982). Judge Anderson differed from the panel majority in that he did not favor adoption of the "self-concealing wrong" theory as a means of tolling the statute of limitations. Instead, he favored requiring affirmative acts of concealment but allowing them to be part of the substantive violation. In his view, the justification for tolling the statute—protecting innocent plaintiffs and not rewarding wrongdoing defendants—is equally applicable no matter when the concealing conduct occurs. App. 39-40. (Judge Anderson then concluded his concurrence by explicating his concern that the panel's decision moved the law closer to a pure "discovery" rule relative to tolling the statute of limitations.)

tions. *See* App. 33. The majority went further and held that bidrigging is a *per se,* or inherently, self-concealing wrong. *See* App. 36-37.

However, the panel majority was concerned that allowing tolling of the statute of limitations on a "self-concealing wrong" theory could exacerbate the very "stale evidence" problem which the statute was designed to prevent. App. 31. Accordingly, the panel adopted a higher standard of proof—"clear and convincing" evidence, rather than the ordinary "preponderance"—for plaintiffs seeking to proceed on such theory. *See* App. 32-33. Furthermore, the panel majority noted that in the case of a self-concealing wrong the evidence necessary to establish tolling is essentially the same as that needed to establish liability. Consequently, the panel extended the heightened evidentiary standard beyond proof of tolling to proof of liability as well. App. 33-34.

Both parties then filed petitions for rehearing, with suggestions for rehearing *en banc.* The State sought such rehearing based on the unprecedented evidentiary standard promulgated by the panel for both tolling and liability. Western Paving sought rehearing as to the sufficiency of an "inherently self-concealing" wrong to toll the statute of limitations.

The Tenth Circuit granted rehearing *en banc.* The issues specified by the appellate court for supplemental briefing and oral argument on rehearing were: (i) the correct interpretation and application of the fraudulent concealment tolling doctrine, including "affirmative acts of concealment" and "inherently self-concealing" wrongs; (ii) whether and the extent to which the Tenth Circuit's prior *King* decision constituted applicable or controlling

precedent,[9] and if so, whether it should be followed, modified or overruled; and (iii) the "clear and convincing" evidentiary standard. App. 2-4.

Following oral argument, the Tenth Circuit was evenly divided. Therefore, the prior judgment of the appellate court was vacated, the opinion of the panel was withdrawn, and the judgment of the District Court was reinstated and affirmed. App. 1-2.

In view of the preceding, the State now brings the case before this Court pursuant to the instant petition for writ of certiorari. The relevant facts of record in support of this petition[10] are as follows:

1. *Continuing bidrigging conspiracy.* Western Paving and other contractors participated in a continuing conspiracy to rig bids which encompassed three highway construction projects let by CDOH in 1971 (the Newcastle Easterly project), 1973 (the Lamar-East project) and 1974 (the Parker Road project). In order to endure over time, the conspiracy had to be and was concealed.

2. *Complementary bids/illusion of competition.* To hide the lack of true competition on each of the three jobs in question, the conspirators, including Western, agreed to and did submit sham or "complementary" bids higher than that of the predetermined winner. This scheme was designed to create the appearance of competition when in fact there was none.

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[9]*See King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d at 1154-56.

[10]As the party which opposed Western Paving's summary judgment motion in the trial court, the State's evidence is to be believed and all inferences are to be drawn in the light most favorable to the State. *See Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S. Ct. 2505, 2513 (1986).

To further enhance the illusion of competition on the 1971 Newcastle Easterly project, two co-conspirators specifically agreed to and did submit complementary bids deceptively close to the predetermined winning bid of Corn Construction Co. In turn, Larry Corn of Corn Construction Co. prepared his bid in such an amount that, although artificially inflated, it nonetheless appeared competitive in relation to the CDOH estimate.

3. *False non-collusion affidavit.* In connection with the 1971 Newcastle project, Larry Corn intentionally submitted to CDOH a false and fraudulent affidavit of non-collusion. He falsely swore in writing under oath that he was unaware of any collusive bidding for the job when in fact he had rigged the bidding on the project with Western Paving and other contractors who submitted complementary bids.

4. *Undercover contacts.* In connection with the 1971 Newcastle project, co-conspirator Corn intentionally placed bidrigging telephone calls to Western Paving and other conspirators from the total privacy of a motel room, away from his office, where the conversations could not be overheard. He also contacted one conspirator in person, away from business offices.

5. *"Talk list"/document destruction.* Also in conjunction with the 1971 project, Corn made a written list containing the names and phone numbers of likely bidders, including Western and other conspirators. He used the list for assistance in making bidrigging telephone calls from the motel room. After making the calls, he destroyed the list with the specific intention of concealing the conspiracy's existence.

6. *Falsified invoice/secret payoff.* In connection with the rigging of bids on the 1974 Parker Road job (on

which Western Paving was a bidder), co-conspirator Fred Settle of Peter Kiewit Sons Co. ("Kiewit") agreed to pay $10,000 to another co-conspirator, Donald Popejoy of Popejoy Construction Co., for submitting a complementary bid in favor of Kiewit. To conceal the existence of the conspiracy, Popejoy fabricated a false invoice for equipment rental, in an uneven amount (*i.e.*, not exactly $10,000), and sent it to Settle. Settle paid the false invoice, thereby effectuating the payoff while keeping the conspiracy secret.

7. *Secrecy* (Corn). The need for secrecy was patently obvious and a matter of implicit understanding among the bidrigging conspirators, including Western Paving; the success of the conspiracy depended upon its not being discovered. For 12 years co-conspirator Corn kept the conspiracy secret and concealed it from all non-participants. He concealed it even from employees within his own company. Corn first disclosed the conspiracy to an outsider (a federal criminal prosecutor) in 1983, approximately 1 year before the filing of the present suit.

8. *Secrecy* (Western). Western Paving's former president, Harold Stillman,[11] participated with Corn and other conspirators in rigging bids on the 1971 Newcastle project. Stillman also kept the conspiracy secret and concealed it from non-participants, so much so that other officers of Western never discovered it or Stillman's participation in it on behalf of Western. Likewise, Alvin Walters of Western Paving kept the conspiracy and his in-

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[11]Mr. Stillman died within five months after involving Western Paving in bidrigging on the 1971 Newcastle project. Significantly, then, even if suit had been filed within the four year statutory limitations period following the 1971 Newcastle project, Mr. Stillman nonetheless would have been unavailable as a witness for either the State or Western.

volvement in it secret and concealed from non-participants, including other officers and personnel of Western.

9. *Secrecy* (Popejoy). As did Corn, Stillman and Walters, Donald Popejoy of Popejoy Construction Co. kept the conspiracy and his involvement in it secret from non-participants. He did not disclose his anticompetitive actions to the State until 1985, twelve years after he rigged the Lamar-East project with various co-conspirators, including Western.

10. *Routine document destruction.* Prior to the filing of suit, the State and Western Paving had each routinely destroyed some but not all documents potentially relevant to the bidrigging conspiracy alleged in the complaint.

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STATEMENT OF DISTRICT COURT'S JURISDICTION

The District Court had federal question jurisdiction of this matter pursuant to 28 U.S.C. secs. 1331 and 1337 (1982), and Sections 1 of the Sherman Act and 4 and 4B of the Clayton Act, 15 U.S.C. secs. 1, 15 and 15b, as amended (1982).

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REASONS FOR ALLOWANCE OF THE WRIT

I. THE INSTANT CASE PRESENTS THE ISSUE OF EQUITABLE TOLLING OF THE ANTITRUST STATUTE OF LIMITATIONS DUE TO FRAUDULENT CONCEALMENT, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT PREVIOUSLY BEEN DECIDED BY THE SUPREME COURT.

In *Bailey v. Glover,* 88 U.S. (21 Wall.) 342 (1875), this Court first enunciated the three-pronged test for fraudulent concealment which equitably tolls federal statutes of limitation. The Court there held that such stat-

utes do not begin to run until the plaintiff discovers or learns of the wrong:

> [1] When there has been no negligence or laches on the part of the plaintiff [2] in coming to the knowledge of the fraud which is the foundation of the suit, and [3] when the fraud has been concealed, *or is of such character as to conceal itself* . . . .

88 U.S. (21 Wall.) at 349-50 (emphasis and numbering added).

Over seventy years later, in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the Supreme Court reaffirmed the applicability of the *Bailey* three-pronged fraudulent concealment exception to all federal statutes of limitation:

> [W]here a plaintiff has been injured and [1] "remains in ignorance of it without any fault or want of diligence or care on his part, [2] the bar of the statute does not begin to run until the fraud is discovered [3] *though there be no special circumstances or effort on the part of the party committing the fraud to conceal it* from the knowledge of the other party." *Bailey v. Glover*, 21 Wall. (US) 342, 348 . . . .
>
> This equitable doctrine is read into *every* federal statute of limitations.

327 U.S. at 397 (emphasis and numbering added).

From the foregoing, it would appear that there exists one, three-pronged test for equitably tolling federal statutes of limitation due to fraudulent concealment. However, the Tenth Circuit's reinstatement and affirmance of the lower court judgment here suggests otherwise.

The opinion of the District Court expressly limits to the fraud context the teaching of *Bailey* and *Holmberg* that the statute of limitations may be tolled even though there is no special effort by the wrongdoer to conceal his

violation because it is of such a nature as to conceal itself. App. 46, 48 & n. 2, 49 & n. 3. Conversely, the trial court viewed various federal courts of appeal as having established a separate, "more stringent" test for tolling the statute of limitations in antitrust cases, requiring the further showing of "affirmative acts of concealment." App. 46-47.

The District Court viewed the standard in antitrust cases as requiring proof that the defendant took affirmative steps in *addition* to the original wrongdoing in order to lead the plaintiff to believe that he did not have a claim for relief. App. 47, 51-52. The lower court reasoned that the need for such proof is obviated in the fraud context, because fraud is a continuing affirmative act of concealment which is inherently more difficult for an injured party to discover. App. 47.

The Supreme Court has never expressly addressed the fraud versus antitrust, "self-concealing" versus "affirmative acts" dichotomy posited in the District Court's ruling. Indeed, this Court has never issued an opinion explicating the fraudulent concealment doctrine in an antitrust context.

A. The Antitrust Laws Are Of Exceptional Public Import And Should Not Be Subjected To A Singularly Expansive Reading Of The Statute of Limitations Which Has The Effect Of Limiting Their Application Or Relegating Them To A Position Inferior To That Of Laws Pertaining To Fraud.

Faith in the value of competition has long been the heart of our national economic policy. *Standard Oil Co.*

v. FTC, 340 U.S. 231, 248 (1951). Indeed, competition is the fundamental principle governing commerce in this country; it is the polestar by which all are to be guided in ordering their business affairs. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398, 406 (1978).

This national "commitment" to the policy of free and open competition in the marketplace is reflected in the antitrust laws. *See Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982). As "the Magna Carta of free enterprise," the antitrust laws are fundamental to the preservation of the American competitive economic system. *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). They are "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958). In short, the antitrust laws embody overarching and fundamental policies of signal public importance. *City of Lafayette*, 435 U.S. at 399, 400.

The District Court's decision here singles out the antitrust statute of limitations for uniquely broad application by giving a more narrow interpretation to the fraudulent concealment doctrine in the antitrust context than in cases relating to mere fraud. This has an obvious and unwarranted limiting effect on the application of the federal antitrust laws. Additionally, it relegates the antitrust laws to a position of inferiority to laws pertaining to fraud. In both respects, the lower court's action contravenes the "fundamental national economic policy" of competition embodied in the antitrust laws. *See Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 759 (1973).

B. It Would Be Antithetical To The Broad Remedial Effect Intended For The Antitrust Laws, And The Notion Of Equity Which Underlies The Fraudulent Concealment Doctrine, To Reward The Most Successful Antitrust Violators By Protecting Them From Suit.

As noted above, the antitrust laws serve important national purposes. Thus, it is not surprising that in enacting them Congress sought to strike as broadly as it could, exercising the full extent of its constitutional powers. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-35 (1948).

Nevertheless, Congress also saw fit to impose a four-year statute of limitations upon antitrust civil damage actions. Clayton Act Section 4B, 15 U.S.C. sec. 15b, as amended (1982). In preventing parties from asserting rights after the lapse of time, such statutes of limitation are designed to prevent fraud. *See Bailey v. Glover*, 88 U.S. (21 Wall.) at 349.

However, the doctrine of fraudulent concealment operates as an exception to federal statutes of limitation. *Holmberg v. Armbrecht*, 327 U.S. at 397. It embodies the important equitable principle that violators of the law should not be shielded by those statutes where the protection would be obtained as a result of the offenders' concealing their violations or committing them in such a manner that they conceal themselves. *See Bailey*, 88 U.S. (21 Wall.) at 349. Otherwise statutes of limitation, which are designed to prevent fraud, would become the very means by which fraud could be effectuated.[12] *Id.* In short,

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[12]The *per se* antitrust offense of bidrigging constitutes fraud, *See United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir. 1986) (bidrigging effectuated by submission of complementary bids and filing of false non-collusion affidavits held to be scheme or artifice to defraud).

the idea behind the fraudulent concealment exception to the statute of limitations is that wrongdoers should not be permitted to take advantage of their own violations.[13] *See Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959).

From the foregoing, it is apparent that the public policies reflected in the antitrust laws and the equitable underpinnings of the fraudulent concealment doctrine are entirely consistent with one another. Congress intended to give broad remedial effect to the federal antitrust laws. *See, e.g., Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312-13 (1978). Congress particularly sought to encourage the vigorous enforcement of those laws by providing a civil treble damage remedy as an incentive for injured persons to bring suit. *Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361, 1370 (10th Cir.), *cert. denied*, 409 U.S. 869 (1972). *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977). An expansive interpretation of the equitable doctrine of fraudulent concealment in the antitrust context, resulting in a narrow reading of the antitrust statute of limitations pertaining to such treble damage actions, facilitates this Congressional purpose.

Conversely, a restrictive interpretation of the fraudulent concealment doctrine, leading to a broad construction of the antitrust statute of limitations, would frustrate Con-

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[13]It would simply be unfair to bar the suit of an injured plaintiff due to the mere lapse of time in situations where it was the wrongdoer's own conduct which prevented the plaintiff from timely bringing suit in the first place. Thus, for reasons of equity the doctrine of fraudulent concealment precludes a statute of limitations defense in such situations. *See Holmberg v. Armbrecht*, 327 U.S. at 396-97.

gress' intent. As cogently stated by the Eighth Circuit in a case involving bidrigging and price-fixing:

> We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized.

Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962). Yet, that is exactly the effect of the decision of the District Court in the case at hand.

C. The Absence Of Supreme Court Direction Regarding Application Of The Fraudulent Concealment Doctrine In the Antitrust Context Is Particularly Problematic In The Case Of Per Se Violations Such As Bidrigging And Price Fixing.

The *per se* offenses of bidrigging and price fixing virtually always involve agreements which are kept secret and meetings which are held in covert fashion, both of necessity in order to effectuate the violation and because of the criminal penalties and civil remedies which might result if such actions are discovered. *See, e.g., New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1084 (2d Cir. 1988) (quoting *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 833 F.2d 867, 881 (10th Cir. 1987)) (bidrigging); *Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983) (price fixing). Moreover, bidrigging conspiracies in particular tend to exist for an extended period of time in

order that all conspirators may be rewarded for their participation. For such continuing conspiracies to be successful, they must be concealed. *See Hendrickson,* 840 F.2d at 1084 (quoting *Western Paving,* 833 F.2d at 881).

Thus, as a practical matter, there is simply no need for *per se* antitrust violators such as bidriggers and price fixers to take any *additional* steps whatever to cover up their already-hidden wrongdoing. A rule that would require them to do so before tolling the statute of limitations against them essentially would mean that the statute would never be tolled in such cases. *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.,* 641 F.Supp. 271, 274 (E.D.Pa. 1986). As a result there would then exist a virtually absolute statute of limitations protecting the most heinous of all antitrust violators at the expense of their innocent victims. Such an approach would directly contravene the important public policies embodied in the antitrust laws and would be violative of traditional notions of fundamental fairness as well. Yet, that is precisely the effect of the District Court's decision in the instant case.

II. THE LOWER FEDERAL COURTS ARE DIVIDED IN THEIR EFFORTS TO INTERPRET AND APPLY THE DOCTRINE OF FRAUDULENT CONCEALMENT TO FEDERAL STATUTES OF LIMITATION.

A. The Tenth Circuit Is Internally Divided And The Decisions Of Other Federal Courts Of Appeal Are In Direct Conflict.

The actions of the Tenth Circuit in this case constitute a paradigm for the conflict and confusion afflicting the federal appellate courts in attempting to deal with the fraudulent concealment doctrine. The Tenth Circuit panel was divided two to one in adopting a definition for "affirmative acts of concealment" sufficient to toll the stat-

ute of limitations under the fraudulent concealment exception. The panel majority viewed such acts as being limited only to steps taken *in addition to* the original wrongdoing and as *not* including acts undertaken in *perpetration* of the offense itself, even though the latter may in fact have the effect of concealing the violation. *Compare* App. 27-28 (panel majority) *with* App. 39-40 (Anderson, J., concurring). Conversely, the panel was split two to one in recognizing that "inherently self-concealing" wrongs are also sufficient to toll the statute of limitations. *Compare* App. 33 (panel majority) *with* App. 39 (Anderson, J., concurring). On *en banc* rehearing, the entire Tenth Circuit was divided four to four. App. 1-2.

Similarly, there is a split among the circuits, in particular concerning whether an "inherently self-concealing" wrong[14] suffices to toll federal statutes of limitation under the fraudulent concealment doctrine in the absence of affirmative acts of concealment. *See Associated Electric Cooperative v. Sachs Electric Co.*, 1987-1 Trade Cas. (CCH) para. 67,567 at p. 60,398 (W.D. Mo. 1987).

One line of circuit court decisions includes a 1988 Sixth Circuit antitrust ruling. Those cases hold that the test for equitably tolling the statute of limitations pursuant to the doctrine of fraudulent concealment requires

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[14]An "inherently self-concealing" wrong has been viewed as one where the offender does only what is necessary to perpetrate the violation, without undertaking any additional efforts at concealment, and those actions alone render the wrong unknowable. In other words, by their very nature the activities in furtherance of the commission of the offense prevent discovery. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 34-35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Long v. Abbott Mortgage Corp.*, 459 F. Supp. 108, 120 (D. Conn. 1978); *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615, 623 (E.D. Mich. 1962).

the wrongdoer to engage in affirmative acts of concealment; commission of an "inherently self-concealing" violation does not suffice. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988). *Accord, e.g., Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978). *See also Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976).

However, another directly conflicting line of federal appellate decisions, including a 1988 Second Circuit antitrust ruling, holds exactly the contrary. Under that line of cases, fraudulent concealment sufficient to toll the statute of limitations may also be established by an "inherently self-concealing" wrong, as indicated in *Bailey v. Glover*. *New York v. Hendrickson Brothers, Inc.*, 840 F.2d at 1083. *Accord, e.g., Hobson v. Wilson*, 737 F.2d 1, 33-35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (T.E.C.A. 1977), *cert. denied*, 435 U.S. 994 (1978); *Baker v. F & F Investment*, 420 F.2d 1191, 1199 (7th Cir. 1970) ("[w]here, *as in the case of many conspiracies in violation of the federal antitrust laws, the wrong is self-concealing*, little need be added in order to justify tolling the statute.").

The conceptual difference between the two disparate approaches is quite simple. To toll the statute of limitations in those circuits following the "affirmative acts" test, the concealing conduct must be separate and apart

from the underlying wrong and intended only to cover it up. To toll the statute in those circuits which additionally recognize the "inherent self-concealment" approach, the concealing conduct may be part and parcel of the commission of the violation itself. *See, e.g., Hobson v. Wilson,* 737 F.2d at 33 n. 102 (endorsing a "self-concealing" interpretation).

However, the difference in case outcomes between the two divergent approaches is vast. Diametrically conflicting results obtain, depending upon which legal test the particular court chooses to apply. A comparison between the instant case and the Second Circuit's *Hendrickson* decision illustrates the startling disparity.

In the present case, the *en banc* Tenth Circuit affirmed a District Court decision which conflicts directly in analysis and result with *Hendrickson.* Each case alleged a continuing conspiracy to rig bids on highway construction projects in violation of Sherman Act Section 1, 15 U.S.C. sec. 1, as amended (1982). Each involved effectuation of the bidrigging scheme through submission of complementary (or accommodation) bids intended to give a deceptive appearance of competition, and the filing of false noncollusion affidavits designed to allay suspicion.

Yet, applying the "affirmative acts of concealment" test, the District Court in the case at hand refused to toll the statute of limitations and dismissed the State's case on summary judgment. Following the "inherent self-concealment" approach, the Second Circuit in *Hendrickson* upheld both the tolling of the statute and a jury verdict resulting in a treble damage judgment for the State of New York in excess of $7.4 million. *Compare* App. 49-53

with 840 F.2d at 1083-85. Neither sound considerations of antitrust policy nor equity justify such disparate results.

B. The District Of Colorado Is Internally Divided And The Decisions Of Other Federal District Courts Are In Direct Conflict.

The division within the District Court here (*i.e.*, the United States District Court for the District of Colorado) exemplifies in microcosm the conflict and confusion besetting the federal district courts in attempting to deal with the tolling of the statute of limitations pursuant to the fraudulent concealment doctrine. During 1984 the State filed in the District Court six different highway bid-rigging antitrust treble damage actions which resulted in significant litigation. Three of those suits were assigned to the senior judge in the instant case, Hon. Alfred A. Arraj. The other three cases were signed to another judge of the same court, Hon. Zita L. Weinshienk.

In all three cases before him, Senior Judge Arraj rejected the "inherent self-concealment" approach to tolling the statute of limitations under the doctrine of fraudulent concealment. He adopted instead, as the exclusive standard, the "affirmative acts of concealment" test. In each of the three suits Senior Judge Arraj then granted either full or partial summary judgment for defendants on the fraudulent concealment question, holding that the statute of limitations had run as to all projects let more than four years before suit was filed.[15] *See, e.g.*, App. 46-53.

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[15]Senior Judge Arraj was of the opinion that the antitrust offense was complete, a cause of action accrued and the statute of limitations began to run at the time rigged bids were sub-

(Continued on following page)

Conversely, in the three cases before her, Judge Weinshienk was of the view that fraudulent concealment tolling the statute of limitations could be established under the "inherently self-concealing" wrong theory as well as by means of "affirmative acts of concealment." Consequently, she granted partial summary judgment for the State in all three cases, ruling that the statute was tolled. *See Colorado ex rel. Woodard v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) para. 67,473 at p. 59,984 (D. Colo. 1987). Perhaps most significantly, Judge Weinshienk did not find any requirement that a concealing act need be undertaken *separate and apart* from the underlying wrong itself. *See id.*

In the same fashion, federal district courts throughout the country are divided in their interpretation and application of the fraudulent concealment exception to the statute of limitations. One line of district court cases holds, as did Senior Judge Arraj in the instant case, that "affirmative acts of concealment" are necessary to toll the statute of limitations under the fraudulent concealment doctrine in antitrust bidrigging cases. *See Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp.

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mitted to the State on a highway construction project. *See, e.g., Colorado ex rel. Woodard v. Goodell Bros., Inc.*, 1986-2 Trade Cas. (CCH) para. 67,236 at pp. 61,196-97 (D. Colo. 1986). At least five different federal appellate courts, including the Tenth Circuit, have explicitly rejected such interpretation in a highway bidrigging context. *See United States v. Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988); *United States v. Northern Improvement Co.*, 814 F.2d 540, 543-44 & n. 2 (8th Cir. 1987), *cert. denied*, — U.S. — , 108 S. Ct. 141-42 (1987); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 245 (4th Cir. 1986); *United States v. Girard*, 744 F.2d 1170, 1173-74 (5th Cir. 1984); *United States v. Inryco*, 642 F.2d 290, 294 (9th Cir. 1981).

885, 888 (M.D. Pa. 1985) (holding that concealing acts are necessary and must be *independent* of underlying violation); *In re Fertilizer Antitrust Litigation,* 1979-2 Trade Cases (CCH) para. 62,894 (E.D. Wash. 1979) (judgment for defendant under "affirmative acts" test in antitrust bidrigging action).

In directly conflicting fashion, other federal district court decisions rule that "inherently self-concealing" wrongs suffice to meet the fraudulent concealment exception and toll the statute of limitations in antitrust bidrigging actions. *See Associated Electric Cooperative v. Sachs Electric Co.,* 1987-1 Trade Cas. (CCH) para. 67,567 (W.D. Mo. 1987); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.,* 641 F.Supp. at 274-75; *F. Buddie Contracting, Inc. v. Seawright,* 595 F.Supp. 422 (N.D. Ohio 1984).

The foregoing split of authority, carrying all the way through to the district court level, should be rectified by this Court before the case law becomes further confused.

C. The Policy Rationale Behind The Fraudulent Concealment Doctrine Mandates One Uniform Appoarch.

Logically, many federal appellate and trial courts have expressly recognized that acts undertaken *in carrying out* a violation may constitute affirmative concealing conduct sufficient to toll the statute of limitations under the fraudulent concealment doctrine.[16] In effect, holding

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[16]*See, e.g., Pinney Dock & Transport Co. v. Penn Central Corp.,* 838 F.2d at 1473-77 (affirmative acts supporting fraudulent concealment may consist of acts in furtherance of violation); *Hobson v. Wilson,* 737 F.2d at 36-37, 41 (affirmative acts of concealment occurred in course of perpetrating offense); *Greenhaw v. Lubbock County Beverage Assoc.,* 721 F.2d at 1030 (evidence indicating concealment consisted of some of evidence establish-

(Continued on following page)

that affirmative concealing conduct may be comprised of acts *implementing* and *effectuating* a conspiracy amounts to a recognition that the conspiracy is self-concealing in such instance. *See, e.g., Long v. Abbott Mortgage Corp.*, 459 F.Supp. 108, 120 (D. Conn. 1978). Leading antitrust commentators support the view that such "inherently self-concealing" misconduct, as well as "affirmative acts of concealment," may serve to toll the statute of limitations under the fraudulent concealment exception. *See, e.g.*, II P. Areeda and D. Turner, *Antitrust Law* sec. 325 at 124 (1978).

Sound reasoning bolsters such conclusion. The policy which underlies the fraudulent concealment doctrine is that an injured plaintiff should have some realistic opportunity to litigate its claims which have not previously been discovered due to the defendant's conduct. In other words, the equitable policy on which the fraudulent concealment doctrine is based outweighs the policy behind the statute of limitations (*i.e.*, that of allowing defendants to repose simply due to the passage of time). *See F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. at 428.

(Continued from previous page)

ing offense); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1302 & n. 12 (5th Cir. 1983) (some of evidence establishing violation also served to conceal it); *Colorado ex rel. Woodard v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) para. 67,473 at p. 59,984 (D. Colo. 1987) (concealing conduct need not be separate and apart from underlying wrong); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. at 272-73 (six of seven separate bases for fraudulent concealment overlapped with factual basis for offense itself); *Nebraska v. Land Paving Co.*, 1986-1 Trade Cas. (CCH) para. 67,106 at p. 62,692 (D. Neb. Nov. 25, 1985) (affirmative acts need not be independent of wrongdoing); *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. at 425-26, 427 (fraudulent concealment consisted not of post-offense affirmative conduct but of participation in secret violation itself).

In the foregoing regard, it makes no difference whether there exist affirmative acts of concealment which are independent of the underlying wrong or whether the concealing acts are part of the violation. In either event, a plaintiff's ability to discover its cause of action and file suit on its claims within the statutory period is equally prejudiced. *See id.* at 428-29. Thus, there is no basis for distinguishing the two situations for statute limitations tolling purposes. *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. at 274. Simply put, the wrongdoing defendant should not be rewarded and the innocent plaintiff victimized. *See* App. 39-40 (Anderson, J. concurring). Consequently, this Court should grant certiorari in order to emphasize the proper focus in this area.

III. THE DECISION IN THE CASE AT HAND APPEARS DIRECTLY TO CONTRAVENE PRIOR SUPREME COURT PRECEDENT.

A. The Instant Case, Involving The Per Se Antitrust Violation Of Bidrigging, Is Not Distinguishable From Prior Supreme Court Decisions.

The District Court here categorized the Supreme Court's prior decisions in *Bailey and Holmberg* as "fraud" cases which are inapplicable in an antitrust context. App. 46, 48 & n. 2. Simply put, that is a mischaracterization. The prior Supreme Court decisions in the fraudulent concealment area involved violations of federal statutes rather than common-law fraud. Nevertheless, this Court applied the fraudulent concealment doctrine uniformly, regardless whether it was invoked in a federal

bankruptcy,[17] land patent[18] or farm loan[19] statutory context.

The case at hand is completely in line with those prior Supreme Court decisions. Here, as there, a federal statutory violation is alleged (of Section 1 of the Sherman Act, 15 U.S.C. sec. 1, as amended (1982)). Moreover, the very essence of the *per se* violation of bidrigging involved here is fraud in any event. *See United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir. 1986). Thus, the distinction asserted by the District Court has no basis in reality.

B. "Passive" As Well As "Active" Concealment Serves To Toll The Running Of The Statute Of Limitations.

Additionally, the District Court here concluded that "active" rather than "passive" concealment is necessary to toll the statute of limitations pursuant to the doctrine of fraudulent concealment. App. 51. Yet, this Court's decision in *Exploration Co. v. United States*, 247 U.S. 435 (1918), upheld the tolling of the statute of limitations where mere "passive," but not "active," concealment was involved.

Similar to Western Paving's participation in a bidrigging conspiracy to violate the Sherman Act, the *Exploration Co.* defendants participated in a conspiracy to violate a federal land patent statute. As in the instant situation, the conspirators there submitted false affidavits to the government. *See* 247 U.S. at 438.

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[17] *Bailey v. Glover*, 88 U.S. (21 Wall.) at 343; *Rosenthal v. Walker*, 111 U.S. 185, 187 (1884).

[18] *Exploration Co. v. United States*, 247 U.S. 435, 436 (1918).

[19] *Holmberg v. Armbrecht*, 327 U.S. at 393.

On these facts, the Supreme Court affirmed the trial court's tolling of the statute of limitations. Such action was premised on the finding that the conspirators had engaged in "passive" concealment through "enjoining silence"—not disclosing the conspiracy's existence until after the statute of limitations had expired. *Id.* That is the very same conduct which the District Court found insufficient to toll the statute here. *See* App. 49-51.

C. There Is No Requirement That Concealing Conduct Be Separate From The Underlying Violation.

Further, the District Court concluded that the affirmative acts needed to establish fraudulent concealment cannot be comprised of the original wrongdoing itself but must be *in addition* to the underlying violation. App. 51-52. However, such holding directly conflicts with prior decisions of this Court where the concealing conduct sufficient to toll the statute of limitations consisted of the illegal activity itself.[20]

D. The Fraudulent Concealment Doctrine Is To Be Read Into, Not Out Of, Federal Statutes Of Limitation.

Finally, the decision of the District Court here would have the effect of imposing an absolute statute of limitations—*i.e.*, one without a fraudulent concealment exception. This would be true at least with respect to "inherently self-concealing" *per se* antitrust violations such as bidrigging and price fixing. In other words, the doctrine

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[20]*See Bailey*, 88 U.S. (21 Wall.) at 342-44 (conspiracy to violate bankruptcy laws); *Rosenthal v. Walker*, 111 U.S. at 186-87 (fraudulent transfer to violate bankruptcy laws); *Exploration Co. v. United States*, 247 U.S. at 435-38 ("self-concealing" conspiracy to violate land patent statute); *Holmberg*, 327 U.S. at 393 (concealment of stock ownership to violate farm loan statute).

of fraudulent concealment would be *read out of* the antitrust statute of limitations in such situations. Such a result would violate the clear teaching of this Court in *Holmberg* that the doctrine of fraudulent concealment is to be read *into every* federal statute of limitations. 327 U.S. at 397.

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CONCLUSION

Despite its importance, particularly in the antitrust area, the doctrine of fraudulent concealment has received little attention from the Supreme Court. The few older cases in the area do not carefully explain how the doctrine should be applied, and the Court has provided little meaningful guidance on the subject either before or after the most recent of those decisions was rendered some 42 years ago.

In this vacuum, the lower federal courts have been left to themselves to decide fraudulent concealment cases. Unfortunately, they have often been unable to discern proper standards for application of the doctrine. Thus they do not always carefully analyze the rules governing application of the doctrine and frequently state conclusions without explaining them in any great depth. Given this ad hoc approach, haphazard results have been almost inevitable.

The current and growing disarray in the law of fraudulent concealment has resulted in large measure from lack of direction from this Court. Given the importance of federal claims in general, and federal antitrust claims in particular, such inattention has resulted in critical con-

fusion.[21] The consequence of that confusion has been to severely impugn the fundamental national economic policy of competition embodied in the antitrust laws.

In view of all of the preceding, the Court should grant certiorari in this case to clarify the law of fraudulent concealment, particularly as it applies in the antitrust context.

Respectfully submitted,

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[21] *See generally* Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829, 833-36 (1983).

APPENDIX

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodward,	)	
Plaintiff-Appellant and Cross-Appellee,	)	Nos. 86-1363 86-1420
v.	)	
WESTERN PAVING CONSTRUCTION CO.,	)	(Filed March 10, 1988)
Defendant-Appellee and Cross-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. Civil Action No. 84-A-1483)

David S. Harmon, Assistant Attorney General, Antitrust Section (Thomas P. McMahon, First Assistant Attorney General, Chief, Antitrust Section; Duane Woodward, Attorney General; Charles B. Howe, Deputy Attorney General; and Richard H. Forman, Solicitor General, with him on the briefs), for Plaintiff-Appellant

John Bodner, Jr., Howrey & Simon, Washington, D.C. (Marcia Press Kaplan of Howrey & Simon, Washington, D.C., and B. Lawrence Theis of Walters & Theis, Denver, Colorado, with him on the brief), for Defendant-Appellee

Robert A. Butterworth, Attorney General of the State of Florida, and Jerome W. Hoffman, Assistant Attorney General of the State of Florida, filed a brief *Amicus Curiae* for the State of Florida

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA and BALDOCK, Circuit Judges

PER CURIAM

The prior judgment of this Court is vacated and the panel opinion of this Court, 833 F.2d 867 (1987), is withdrawn. The judgment of the District Court is affirmed by an equally divided Court.

JANUARY TERM—JANUARY 29, 1988

Before Hon. William J. Holloway, Jr., Chief Judge, Hon. Monroe G. McKay, Hon. James K. Logan, Hon. Stephanie K. Seymour, Hon. John P. Moore, Hon. Stephen H. Anderson, Hon. Deanell R. Tacha, and Hon. Bobby R. Baldock, Circuit Judges, United States Court of Appeals.

STATE OF COLORADO, ex rel. COLORADO ATTORNEY GENERAL, DUANE WOODWARD,	)	
Plaintiff/Appellant and Cross-Appellee,	)	
v.	)	Nos. 86-1363 86-1420
WESTERN PAVING CONSTRUCTION CO.,	)	
Defendant/Appellee and Cross-Appellant.	)	

The Court, sitting en banc, will hear oral argument in the captioned appeals on Thursday, March 3, 1988, at 2:00 p.m. The issues to be argued are those raised both in the

briefs on appeal and in the petitions for rehearing with respect to the correct interpretation and application of the fraudulent concealment doctrine of tolling, inclusive of questions relating to affirmative acts of concealment and self-concealing fraud. Those issues shall include argument with respect to the extent, if any, that this Court's opinion in *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), applies to or governs the issues in the captioned appeals, and, if it applies, whether that case should be followed, modified or overruled. Additionally, the parties shall address the issue of the clear and convincing evidence standard imposed in the majority opinion in these appeals.

The Court will take into account the briefs already filed by the parties in the appeals. The parties are not required to file additional briefs. However, they are permitted to file simultaneous supplemental briefs, not in excess of 30 pages, on the issues referred to herein, no later than Friday, February 19, 1988.

/s/ Robert L. Hoecker
Robert L. Hoecker
Clerk

NOVEMBER TERM—December 31, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodward,	)	
Plaintiff-Appellant, Cross-Appellee,	)	
v.	)	Nos. 86-1363 and 86-1420
WESTERN PAVING CONSTRUCTION CO.,	)	
Defendant-Appellee, Cross-Appellant.	)	

The petitions for rehearing are granted and the suggestions for rehearing en banc are accepted. Argument before the court *en banc* shall be heard at the March Term of Court, February 29, 1988 to March 4, 1988. The parties will be advised of the date and time of argument.

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Chief Deputy Clerk

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodward,	)	
Plaintiff-Appellant and Cross-Appellee,	)	Nos. 86-1363 86-1420
v.	)	
WESTERN PAVING CONSTRUCTION CO.,	)	(Filed Nov. 16, 1987)
Defendant-Appellee and Cross-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. Civil Action No. 84-A-1483)

David S. Harmon, Assistant Attorney General, Antitrust Section (Thomas P. McMahon, First Assistant Attorney General, Chief, Antitrust Section; Duane Woodard, Attorney General; Charles B. Howe, Deputy Attorney General; and Richard H. Forman, Solicitor General, with him on the briefs), for Plaintiff-Appellant.

John Bodner, Jr., Howrey & Simon, Washington, D.C. (Marcia Press Kaplan of Howrey & Simon, Washington, D.C., and B. Lawrence Theis of Walters & Theis, Denver, Colorado, with him on the brief), for Defendant-Appellee.

Before McKAY, SEYMOUR and ANDERSON, Circuit Judges.

McKAY, Circuit Judge.

On July 19, 1984, plaintiff, State of Colorado, filed a private antitrust claim under section one of the Sherman

Antitrust Act, 15 U.S.C. § 1 (1982), against defendant, Western Paving Construction Company. Plaintiff accuses defendant of engaging in a conspiracy to rig bids on Colorado highway construction projects from "as early as January of 1971" and extending "at least to some time in 1978." Amended Complaint, record, vol. 1, doc. 2, at 3. Because plaintiff did not allege that its cause of action arose on or after July 20, 1980, the "critical date" for purposes of the antitrust statute of limitation, 15 U.S.C. § 15b (1982), it claimed that the statute should be tolled because defendant fraudulently concealed the alleged violations.

After both parties conducted discovery on the fraudulent concealment issue, defendant filed two motions. First, it filed a motion for summary judgment, claiming that plaintiff had not shown fraudulent concealment and, therefore, the action should be dismissed under the statute of limitations. Second, defendant filed a motion to dismiss and to grant attorney's fees under Fed. R. Civ. P. 11, contending that plaintiff's action was frivolous and that its investigation was inadequate. Plaintiff responded by filing a motion for partial summary judgment on the statute of limitations issue.

The district court granted defendant's motion for summary judgment, finding that plaintiff had not shown affirmative acts of concealment and that a self-concealing conspiracy alone would not toll the antitrust statute of limitations. The court also denied defendant's motion for attorney's fees, finding plaintiff's action was not frivolous and its investigation was adequate.

Plaintiff appeals, arguing that it has shown either that defendant engaged in a self-concealing conspiracy or

that defendant or its coconspirators committed affirmative acts of concealment. Either of these propositions, plaintiff claims, entitles plaintiff to toll the statute of limitations under the fraudulent concealment doctrine. Defendant cross-appeals, claiming that the district court erred in refusing to grant it attorney's fees.

I. Background

Plaintiff's most reliable evidence of fraudulent concealment arises from events surrounding three specific construction projects: (1) the 1971 Newcastle-Easterly project; (2) the 1972 Lamar-East project; and (3) the 1974 Parker Road project. Evidence on these events is derived from the deposition testimony of Larry Wallace Corn and Donald G. Popejoy.

Mr. Corn, an employee of one of defendant's alleged coconspirators, testified extensively on his involvement in bidrigging on the Newcastle project. Prior to giving any testimony, Mr. Corn entered a settlement agreement with plaintiff concerning his and his employer's bidrigging activities in Colorado. As a part of that agreement, Mr. Corn agreed to fully cooperate in plaintiff's efforts to investigate and prosecute other alleged bidriggers. While Mr. Corn admitted participation in thirteen bidrigging schemes, the Newcastle project is the only project in which he mentions defendant as one of the conspirators.

Mr. Corn organized the bidrigging on the Newcastle project. To carry out his scheme, he first consulted the plan holders list published by plaintiff and asked the state engineer which contractors had actually looked at the project. He then compiled a list of potential bidders, their telephone numbers and, in those cases in which he knew,

the party to contact. Once the list was completed, Mr. Corn began contacting the potential bidders.

In making his contacts, Mr. Corn started with the bidders he felt would be the most serious competitors. Once these companies had agreed to cooperate, he continued down his list until he had contacted all potential bidders. While defendant was allegedly on Mr. Corn's list, it was not one of the serious competitors.

Mr. Corn testified that he made most contacts by telephone from a hotel room in Denver in which he stayed during the bidletting on the Newcastle project. Mr. Corn testified that when he called a potential bidder, he first obtained a commitment to participate in the bidrigging scheme and then revealed the approximate amount of Corn Construction's bid on the project. After Mr. Corn obtained a commitment to participate in the scheme, he added the name of the person with whom he spoke to his list of bidders.

Mr. Corn had difficulty remembering the details of these contacts. When asked about details of the conversations, he replied:

> There isn't any way I can sit here today and tell you exactly what I told those people thirteen, fourteen years ago. I can tell you I got the job rigged and I talked to these people and gave them our bid or very close to that figure so they would have an idea of where to bid.

Deposition of Larry Wallace Corn, record, vol. 2, at 46. Mr. Corn also had difficulty remembering which parties he had actually contacted and how many times he may have called particular persons. However, he maintained

that each party he contacted agreed to participate in the bidrigging scheme and agreed to submit a complementary bid.

After all contacts were made, Mr. Corn was ready to attend the bidletting ceremony. Just prior to attending, or immediately after the ceremony, Mr. Corn destroyed his list of potential bidders. He testified that this was done to avoid discovery of the list and to cover up the bidrigging scheme. At the bidletting ceremony, Corn Construction, Mr. Corn's employer, was the successful bidder. As was required by plaintiff, Mr. Corn executed an affidavit stating that neither he nor Corn Construction had colluded in arriving at the bid amount. Mr. Corn testified that he executed this affidavit even though he knew it was false.

Mr. Corn remembered specific contacts with defendant. He testified that he initially called Alvin Walters and asked "if they would allow us to be the successful bidder on the job and he told me that I'd have to talk to Harold Stillman." *Id.* at 22. At the time, Mr. Stillman was responsible for all defendant's bids on projects outside the Denver metropolitan area. Mr. Walters denied any conversation with Mr. Corn.

Mr. Corn claimed that he spoke to Mr. Stillman, who agreed to cooperate and to submit a complementary bid. Specifically, Mr. Corn testified that he gave Corn Construction's bid amount to Mr. Stillman, *id.* at 47, and that he called Mr. Stillman from his hotel room. *Id.* at 55. When asked about a specific recollection of the conversation, Mr. Corn stated:

> I can tell you the gist of it. I told him we were interested on the job in New Castle, we were set up in

> the pit and we were wondering if they'd go along with us. I can't remember what his immediate reply was. The end result was that they said they would, but we owed them a job.

Id. at 63. On cross-examination, Mr. Corn reiterated:

> I just asked him if he would go along with us on it and that we were interested in the job, that we were set up there and would be willing to give him a future job. And he agreed and just said that we owed him one or something to that effect.
>
> . . . .
>
> I knew after I talked to him that he was willing to go along with us and we owed him a future job. I don't remember exactly how that was arrived at.

Id. at 117. Despite this testimony, Mr. Corn admitted that defendant never received a complementary bid from Corn Construction. He testified that Newcastle is the only project about which he talked to defendant.

Defendant did not present any testimony to counter Mr. Corn's testimony as to conversations with Mr. Stillman because none is available. Mr. Stillman died long before plaintiff filed this suit; thus, he was never able to give his testimony concerning the events surrounding the Newcastle project. Defendant's other employees denied any knowledge of a bidrigging scheme, and Mr. Corn admitted that he has no evidence that Mr. Stillman revealed the scheme to any other employee.

Plaintiff does have a bid tabulation showing that defendant submitted a bid on the Newcastle project. However, there is no other evidence to prove or disprove Mr. Corn's testimony. With the exception of the bid tabulation, both defendant and plaintiff have destroyed all docu-

ments relating to the Newcastle project, and Mr. Stillman's testimony is unavailable. Thus, the district court had the testimony of only one man to determine whether defendant actually participated in any scheme to rig the bid on the Newcastle project.

Plaintiff contends, however, that Mr. Corn's testimony was supported by Mr. Popejoy's deposition testimony concerning the Lamar and Parker Road projects. Mr. Popejoy is an employee of Popejoy Construction Company, Inc., another of defendant's alleged coconspirators. Like Mr. Corn and Corn Construction, Mr. Popejoy and his employer entered a settlement agreement with plaintiff and federal authorities. The agreements cover all antitrust activities by Mr. Popejoy and Popejoy Construction, and as a portion of the agreements, Mr. Popejoy agreed to fully cooperate with plaintiff in its investigation and prosecution of other alleged bidriggers.

Mr. Popejoy testified that prior to the bidletting on the Lamar project, he contacted a number of potential bidders. He wished to determine whether the bidder was "intersted" in the project. One Colorado construction company had told Mr. Popejoy that if a company said it was "interested" in the project, the company was bidding below the engineer's estimate. On the other hand, if the company said it was "not interested," it was bidding above the estimate. While Mr. Popejoy understood the meanings attached to "interested" and "not interested," he did not actually know how many, if any, of the other companies actually attached that particular meaning to their statements.

Mr. Popejoy testified that when he made the calls on the Lamar project, none of the bidders said it was in-

terested. As a result, Mr. Popejoy submitted the bid he had prepared prior to making the contacts. He testified that if one or more potential bidder had expressed interest in the project, his bid would probably have been lower, but not more than $5,000. Mr. Popejoy also said that although he now realizes the calls probably violated antitrust laws, when he made them he did not realize he was committing antitrust violations. Rather, he thought he was testing the market for interest in the project. As was the practice, after Popejoy Construction won the bid on the Lamar project, Mr. Popejoy executed a noncollusion affidavit. Mr. Popejoy did not knowingly execute a false affidavit, however, because he did not know his telephone calls amounted to collusion.

Mr. Popejoy's contacts with defendant were made through Mr. Walters. Mr. Popejoy said that he asked Mr. Walters if defendant was interested in bidding on the Lamar project, and Mr. Walters replied that it was not. Mr. Popejoy then remembered that Mr. Walters asked what Mr. Popejoy was going to do about Domenic Leone, another bidder on the project. Mr. Popejoy responded that he was going to take his chances and recalled that Mr. Walters replied, "That's a very interesting approach." Mr. Walters' version of the conversation was different. He admitted that he spoke with Mr. Popejoy but testified that he simply told Mr. Popejoy that defendant was not interested in the project and, in fact, stated that defendant was getting out of the business of bidding projects outside the Denver metropolitan area.

As with the Newcastle project, plaintiff does have a bid tabulation showing defendant bid on the Lamar proj-

ect, but all other documents related to the project have been destroyed in the normal course of business. Furthermore, neither Mr. Popejoy's nor Mr. Walters' testimony can be corroborated because all other employees of defendant deny knowledge of any bidrigging activities, and Mr. Popejoy admitted that he spoke to no one about the call to defendant. Mr. Popejoy, however, admitted that this is the only contact he ever had with defendant and that, while some other companies asked Popejoy Construction to submit a complementary bid on some other project, defendant never requested any quid pro quo for its allegedly complementary bid on the Lamar project.

Mr. Popejoy also indirectly implicated defendant in bidrigging on the Parker Road project. He testified that while he was in Denver to bid on that project, he was approached by an employee of Peter Kiewit, another of defendant's alleged coconspirators, and asked to raise Popejoy Construction's bid on the project. Mr. Popejoy initially refused to raise the bid, but when he was promised a $10,000 payment in return for the increase, he agreed to change the bid. Mr. Popejoy had no actual knowledge of any contact between defendant and Peter Kiewit but claimed that he would not have received the $10,000 unless all bidders had been contacted and had agreed to go along with the bidrigging scheme. Again, a bid tabulation shows defendant as a bidder on the project, but all other documentation has been destroyed. Furthermore, plaintiff presented no other evidence corroborating Mr. Popejoy's testimony.

II. Tolling the Statute of Limitations

The antitrust statute of limitations states: "Any action to enforce any cause of action under [antitrust stat-

utes] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (1982). While this statute seems to allow only a four-year period in which to bring an antitrust claim, every circuit court that has decided the issue allows tolling of the statute under the fraudulent concealment doctrine. *See Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974); *General Elec. Co. v. City of San Antonio*, 334 F.2d 480, 484-85 (5th Cir. 1964); *Westinghouse Elec. Corp. v. City of Burlington*, 326 F.2d 691, 692 (D.C. Cir. 1964) (per curiam); *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575, 576 (9th Cir. 1964); *Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co.*, 315 F.2d 558 (7th Cir. 1963); *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963); *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), 373 U.S. 914 (1963); *see also Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984) (discusses fraudulent concealment without deciding whether it should or should not apply), *cert. denied*, 470 U.S. 1056 (1985). Plaintiff argues its claim falls within this exception to the statute of limitations. To understand application of fraudulent concealment to plaintiff's case, we first review the policies behind statutes of limitations and the fraudulent concealment doctrine.

A. Statutes of Limitations Policies

"Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and

approved in all systems of enlightened jurisprudence." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). They reflect a balancing of "the interests in favor of protecting valid claims" and "the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). Plaintiffs with valid claims have a right to recover; however, the passage of time may make it more difficult to distinguish between valid and invalid claims.

> Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the factfinding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Board of Regents of the Univ. of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980). Statutes of limitations serve that purpose. They cut off a plaintiff's right to pursue a claim and thereby avoid trial of stale claims.

Statutes of limitations assist the courts by making the adjudication process more efficient. This process is otherwise "hampered by stale evidence and absent witnesses." *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981).

> Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh.

Tomanio, 446 U.S. at 487. Thus, if statutes of limitations cut off stale claims, courts are left to try cases with more reliable evidence, thereby producing more reliable results. In addition, disallowing stale claims permits courts to try more cases because stale claims take longer to try. Witnesses with faded memories usually take longer to examine. When direct evidence has been lost or destroyed, litigants must use circumstantial evidence to prove the same points, and circumstantial evidence usually takes longer to present. Statutes of limitations thus allow courts to avoid these problems.

Statutes of limitations also benefit defendants in at least two important ways. First, they protect defendants against invalid claims. "[F]alse or fraudulent claims . . . might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable." *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975). By limiting the period during which a plaintiff is allowed to file a claim, the legislature reduces the risk that a defendant will be required to defend against a false claim. Second,

> entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time. It is this interest in finality which underlies the description of a limitations act as a "statute of repose."

Id. Once the statutory period has passed, a party can be certain that it will no longer be required to answer on the merits a contingent liability. The mere passage of time operates to cut off all claims. Thus, after a period of

time, a party can carry on its affairs with no need to worry about contingent liabilities.

> Statutes of limitations are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979). Because of their mechanical application, "statutes of limitation result in hardship to plaintiffs in some cases." *Steele v. United States,* 599 F.2d 823, 828 (7th Cir. 1979). However, "alleviation of that hardship is a matter of policy for the Congress." *Kaltreider Const., Inc. v. United States,* 303 F.2d 366, 368-69 (3d Cir.), *cert. denied,* 371 U.S. 877 (1962). Once Congress, or some state legislative body, has determined what is a sufficient period for bringing a claim, the courts should refuse to hear the claim after that time has passed. "Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Davco Corp.,* 523 F.2d at 394. Plaintiffs should not be allowed to argue that no logical reason exists for applying the statute to their case. After all,

> [s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has

> been lost. *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They present a public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (footnote omitted). Legislatures enact a statute of limitations to apply to all cases covered by the statute. As the legislature is the one to make such policy decisions, the only decision for the courts is whether the claim is within the coverage of the statute.

B. Fraudulent Concealment

Although "[s]tatutes of limitations are vital to the welfare of society," *Wood,* 101 U.S. at 139, "most courts and legislatures have recognized that there are factual circumstances which justify an exception to these strong policies of repose." *Tomanio,* 446 U.S. at 487. Legislatures create some exceptions by enacting tolling provisions. In addition, a court that faces a factual circumstance that makes application of a statute of limitations particularly harsh may develop a tolling doctrine to ameliorate the harshness. One judicially created tolling doctrine is fraudulent concealment.

In explaining the basis for tolling under a fraudulent concealment claim, the Supreme Court stated:

> [Statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evi-

> dence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1875). The Court went on to hold that

> when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

Id. at 349-50. The Supreme Court, thus, adopted fraudulent concealment as a legitimate means of tolling a statute of limitations. The Court subsequently stated that this "doctrine is read into every federal statute of limitation." *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946). As a result, courts have applied fraudulent concealment to most statutes of limitations.

Despite broad use of the doctrine, courts have developed principles that limit the factual circumstances to which fraudulent concealment will apply. To maintain a fraudulent concealment claim, a plaintiff must plead and prove three elements: (1) use of fraudulent means by defendant; (2) concealment of plaintiff's cause of action; and (3) plaintiff's due diligence in attempting to uncover the claim. *See, e.g., King & King Enters. v. Champlin*

Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). A plaintiff who fails to plead and prove all three elements will have its claim dismissed as barred by the statute of limitations.

Pleading requirements for fraudulent concealment are very strict. Some courts invoke Fed. R. Civ. P. 9(b) and require a plaintiff to meet the pleading requirements for fraud. *See, e.g., Dayco Corp.*, 523 F.2d at 394. Other courts, while not specifically invoking Rule 9, still require specificity and particularity in pleading. *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978); *Weinberger*, 498 F.2d at 555. While a pleading deficiency can be corrected by an amendment, failure to correct the problem after the amendment results in a dismissal. *See Charlotte Telecasters*, 546 F.2d at 574; *see also NL Indus., Inc. v. Gulf & W. Indus., Inc.*, 650 F. Supp. 1115, 1135 (D. Kan. 1986) (plaintiff allowed to amend but warned to "set forth facts *with particularity*"). These pleading requirements reflect the same concerns that underlie the requirement to plead fraud with particularity. Allegations of fraudulent concealment, like allegations of fraud, are harsh and may be difficult to disprove, particularly if some time has passed since the alleged concealment. Thus, in order to put the defendant on notice as to the specific allegations, courts require specific pleading. This informs the defendant of the alleged acts of concealment and allows the trial court to determine, at an early stage, whether the plaintiff has a valid concealment claim.

The pleading must set forth specific facts to prove each of the three elements of a fraudulent concealment. "[M]erely intoning the word 'fraudulently' is not sufficient to avoid the statute." *Charlotte Telecasters,* 546 F.2d at 574. Rather, "[t]he term 'fraudulent concealment' implies active misconduct." *Taylor v. Meirick,* 712 F.2d 1112, 1118 (7th Cir. 1983). Courts have alternatively stated that the defendant must engage in "some trick or contrivance," *Wood,* 101 U.S. at 143, "some misleading, deceptive or otherwise contrived action or scheme." *Hobson v. Wilson,* 737 F.2d 1, 34 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985), or "some positive misconduct." *Kriegesmann v. Barry-Wehmiller Co.,* 739 F.2d 357, 359 (8th Cir.), *cert. denied,* 469 U.S. 1036 (1984). The underlying requirement is that defendant must engage in conduct meant to conceal. The only justified reason for allowing tolling under fraudulent concealment is that the plaintiff does not know about its cause of action before the statute of limitations runs and that the defendant caused that lack of knowledge. Defendant should be subject to an extended limitation period only when it took direct action to thwart plaintiff's effort to bring a claim. Silence, without some fiduciary duty, never satisfies this fraudulent-means element. *King & King Enterps.,* 657 F.2d at 1155; *Rutledge,* 576 F.2d at 250. Denial of wrongdoing, which can be expected of all wrongdoers, is also not sufficient to toll the statute. *King & King Enterps.,* 657 F.2d at 1155; *Dayco Corp. v. Firestone Tire & Rubber Co.,* 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd,* 523 F.2d 389 (6th Cir. 1975); *but see Rutledge,* 576 F.2d at 250 ("denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff's reli-

ance upon the denial reasonable''). Plaintiff must prove that the defendant engaged in some conduct that is meant to conceal important facts from plaintiff.

Concealment of material facts, standing alone, may not be fraudulent concealment. The District of Columbia Circuit explained:

> [T]he statute of limitation is not tolled whenever a defendant has concealed facts material to *any* legal issue of significance in a case. We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.

Hohri v. United States, 782 F.2d 227, 249 n.57 (D.C. Cir. 1986), *vacated on other grounds,* 107 S. Ct. 2246 (1987). In other words, the facts concealed must be not only material, but they must also be relevant to a ''critical element or defense attending [a] particular cause of action.'' *Id.* at 250. The crucial point is that a plaintiff should be given the opportunity to pursue a claim after the statutory limitation period has run only if it was unable to pursue the claim before the statutory period expired. If a plaintiff is led to believe that it has no cause of action or that the claim is subject to an iron-clad defense, then the concealment deprives the plaintiff of an opportunity to bring a timely action. Otherwise, plaintiff should pursue its claim before the statute runs. Only a concealment that makes it impossible for plaintiff to avoid dismissal for failure to state a claim supports a fraudulent concealment charge.

Fraudulent concealment also requires that the plaintiff be ignorant of the concealed facts. "The doctrine of equitable tolling is only available to toll the running of the statute of limitations during the period in which the potential defendants are concealing the cause of action from the potential plaintiff." *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1005 (7th Cir. 1984). Once a plaintiff actually learns the concealed facts, the statute begins to run. *See id.; cf. Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443-44 (6th Cir. 1981) (even when plaintiff discovers cause of action within four-year limitation period, statute is tolled until the discovery and runs as soon as plaintiff discovers the concealed facts). Furthermore, the plaintiff must prove that it lacked any reason to inquire into circumstances surrounding the claim. *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir.), *cert. denied*, 107 S. Ct. 279 (1986); *Taylor*, 712 F.2d at 1118 (concealment must "frustrate[] even diligent inquiry"). When a plaintiff who has had its suspicions aroused fails to investigate, "equity will impute to [it] knowledge of facts that would have been revealed by reasonably required further investigation." *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984). Failure to investigate may result in a finding of no fraudulent concealment. *Id.; Berkson*, 743 F.2d at 56. Thus, to prove lack of knowledge plaintiff must show that it has no knowledge of the concealed facts and that it had no information that should have caused it to investigate and, in turn, uncover the claim.

In summary, a plaintiff seeking to avoid the statute of limitations by invoking fraudulent concealment must

satisfy strict requirements. It must specifically plead and prove facts supporting all three required elements and, in doing so, must show that it was impossible for the plaintiff to maintain the cause of action before the statute had run. Fraudulent concealment has a place in the law, but as an ameliorative doctrine, its application should be limited to circumstances that led to its creation—namely, when defendant's actions foreclose any chance for plaintiff to bring its claim before the statutory limitation period expires.

Despite these requirements limiting the application of the doctrine, fraudulent concealment still presents a difficult analytical problem. Proving the alleged act of concealment is subject to the same problems of staleness and potential for unjustified claims as proving the primary cause of action. In some cases, the last claimed act of concealment may occur almost simultaneously with the acts claimed to constitute the Sherman Act violation. In fact, in the case at hand proof of the claimed concealment is essentially identical to proof of the claimed antitrust violation. In those instances, faded memory and lost evidence is as likely to produce an unjust or erroneous finding of concealment as such evidence is to produce a similar finding on the merits. As a result, permitting tolling for fraudulent concealment itself undermines the policy embodied in the statute of limitations: to insure against unreasonable hazard of inaccurate results derived from

the unreliability of stale or lost evidence.[1] Therefore, courts must apply the tolling doctrine of fraudulent concealment with great care, recognizing that the tolling claim itself is fraught with potential for unjust and unwarranted establishment by stale and incomplete evidence.

C. Plaintiff State of Colorado's Fraudulent Concealment Claim

The district court held that plaintiff's claim was barred by the statute of limitations. This included a decision that plaintiff failed to present evidence to support its fraudulent concealment claim. More specifically, the district court found that plaintiff failed to present evidence showing that defendant used fraudulent means to conceal plaintiff's cause of action. The district court first required plaintiff to show affirmative acts of concealment to satisfy the fraudulent means element and then found that plaintiff presented no affirmative acts.[2] Plaintiff

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[1] Congress must have had some of these considerations in mind when it enacted the antitrust statute of limitations. In fact, questions arose in debates about the application of the statute in cases of conspiracy. The consistent reply was that in cases of fraud and conspiracy the statute would not run until the time of discovery. *See, e.g.*, 101 Cong. Rec. 5129, 5130, 5132-33 (1955); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 278-80 (8th Cir.) (analysis of the legislative history), *cert. denied*, 371 U.S. 912 (1962), 373 U.S. 914 (1963). At that time, the doctrine of fraudulent concealment was a well-recognized tolling doctrine, and thus, as noted earlier, all circuit courts decided that it should apply in antitrust cases.

[2] Because the district court found that plaintiff had not satisfied the first element of the fraudulent concealment test, it did not reach the other elements. Colorado ex rel Woodward v. Western Paving Const. Co., 630 F. Supp. 206, 211 n.5 (D. Colo. 1986). We likewise do not reach them; they are best left for an initial decision by the district court.

claims that this decision is erroneous because it showed affirmative acts and because proof of a self-concealing conspiracy can satisfy the fraudulent means element.

1. Affirmative Acts of Concealment

In the district court, plaintiff asserted the following affirmative acts: (1) Larry Corn's submission of a false non-collusion affidavit in connection with the Newcastle project; (2) Western Paving's representative falsely denying any wrongdoing during a May 1982 interview; (3) Mr. Stillman's failure to disclose existence of the conspiracy to other employees of defendant; (4) defendant's submission of a complementary bid on the Newcastle project; and (5) Mr. Corn's preparation of the competitor list and making of telephone calls from a hotel room. The district court was correct in concluding that none of these acts should be considered affirmative acts of concealment.

"A denial of an accusation of wrongdoing does not constitute fraudulent concealment." *King & King Enters.*, 657 F.2d at 1155 (quoting *King & King Enters. v. Champlin Petroleum Co.*, 446 F. Supp. 906, 912 (E.D. Okla. 1978)). A denial of wrongdoing can be expected of every wrongdoer as well as every innocent accused of wrongdoing. Thus, plaintiff should not be permitted to maintain its cause of action after the statute of limitations has run merely because defendant, or its alleged coconspirator, denied any wrongdoing. The same may be said of silence. "[I]n the absence of a fiduciary duty between the parties, mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment." *Id.* (quoting *King & King Enters.*, 446 F. Supp. at 912). No

one who commits antitrust violations announces the violations to the potential plaintiffs. Thus, if silence were an affirmative act of concealment, every antitrust claim would be tolled until the plaintiff discovered what it asserts is evidence supporting its action. We refuse to adopt such a rule.

Three of the alleged affirmative acts of concealment were either a denial of wrongdoing or silence. Mr. Corn's submission of the noncollusion affidavit was no more than his denial of wrongdoing in preparing the Newcastle bid. Plaintiff's allegations state that defendant's representatives denied any wrongdoing when questioned during the 1982 interviews; even if the allegation is true, it claims nothing more than a denial of wrongdoing. Finally, Mr. Stillman's failure to disclose the existence of the conpiracy is at most silence. None of these three acts will support a fraudulent concealment claim.

The remaining acts were a part of the underlying conspiracy. If plaintiff's allegations are true and defendant and others engaged in a bidrigging conspiracy, then complementary bids were necessary. Furthermore, Mr. Corn's preparation of the competitor list would have been one step in carrying out that conspiracy. We agree with the district court that affirmative acts of concealment are "steps [taken] *in addition* to the original wrongdoing to prevent the plaintiff from discovering the wrong." *Colorado ex rel Woodard v. Western Paving Const. Co.*, 630 F. Supp. 206, 210 (D. Colo. 1986) (emphasis added). Acts that are part of the original wrong, while they may conceal the wrong, are not acts of concealment; they are acts

of perpetration. Consequently, plaintiff has shown no affirmative acts of concealment.

2. Self-Concealing Conspiracy

Plaintiff also argues that proof of a self-concealing conspiracy satisfies the fraudulent means element. The district court rejected this argument, stating:

> Plaintiff relies on *dicta* in *King & King* in which the Court discussed a Temporary Emergency Court of Appeals case in which that court stated that a defendant's conduct can sometimes be "inherently self-concealing," thus dispensing with the requirement of proof of affirmative acts of concealment. However, this *dicta* is directly contrary to the holding in *King & King* and the Court's statement that "[O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing . . . that some *affirmative act* of fraudulent concealment frustrated discovery notwithstanding [the plaintiff's] diligence."

Western Paving, 630 F. Supp. at 209 n.3 (quoting *King & King Enters.*, 657 F.2d at 1154-55). In *King & King Enterprises*, the affirmative acts of concealment—preparing a "talk/no talk" list and placing telephone calls after normal working hours—were also acts of perpetration. As Judge Anderson observes in his concurrence, the facts of *King & King Enterprises* do not require that the acts of concealment be independent of the underlying claim. Since the acts occurred contemporaneous with—rather than subsequent to—the original wrong, they could also support a self-concealing conspiracy theory. However, while requiring "some affirmative act" of concealment, the court never explicitly addressed the self-concealing argument. Thus,

although *King & King Enterprises* does not by its language mandate acceptance of a self-concealing conspiracy argument, neither does it foreclose such an argument. The matter of self-concealment described as such is one of first impression in this court.

While no circuit court has reached the issue in antitrust claims, the District of Columbia Circuit has decided that a self-concealing conspiracy could toll the statute of limitations in a civil rights action. *Hobson v. Wilson*, 737 F.2d 1, 33-34 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Two district court cases support plaintiff's claim. The court in *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984), stated:

> [T]he reason for tolling the statute of limitations [is] the plaintiff's ignorance of its claim because of the defendant's conduct. The statute of limitations exists for the purposes of barring stale conflicts. While the statute allows the defendant to repose after the passage of time, this policy is subsidiary to the policy that the plaintiff should have some opportunity to litigate his claim.

Id. at 428 (citation omitted). The court went on to state: "A self-concealing conspiracy, therefore, is the logical equivalent of affirmative acts which conceal a potential plaintiff's claim." *Id.* at 429. The court then allowed proof of a self-concealing conspiracy to support a fraudulent concealment claim.

The court in *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. 271 (E.D. Pa. 1986), reached the same conclusion. It stated:

> [A] self-concealing conspiracy is the logical equivalent of affirmative acts which conceal a plaintiff's claim; in both instances, the plaintiff lacks the oppor-

> tunity to bring the claim because of its inability to discover it. . . . I can see no reason to distinguish between situations where a conspiracy is self-concealing and where plaintiff alleges affirmative conduct by the defendant to conceal wrongdoing.

Id. at 274. The court then allowed tolling of the statute based on a self-concealing conspiracy argument.

The Ohio district court also recognized that its interpretation of fraudulent concealment could toll the statute of limtaitions indefinitely. However, it stated that requiring the plaintiff to plead and prove the other elements of fraudulent concealment would overcome this problem. *F. Buddie Contracting*, 595 F. Supp. at 429 n.4; *but see Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 888 (M.D. Pa. 1985) (self-concealing conspiracy argument rejected because it would toll statute indefinitely).

None of these decisions, however, considers problems that may arise when stale evidence is used to show the self-concealing conspiracy. These problems influenced the district court's decision in this case.

> This is a classic case in which the statute of limitations should be given effect. The facts forming the basis for plaintiff's claim occurred over 13 years prior to the filing of the complaint. The State's case is based almost entirely on the testimony of one witness, Larry Corn. His testimony cannot be corroborated because the only Western Paving employee with whom he "conspired," Harold Stillman, is now deceased. Both parties admit that many, if not all, of the relevant documents, including the noncollusion affidavits, bid proposals and other documents relating to the bidding process, have been destroyed pursuant to normal record retention policies.

Western Paving, 630 F. Supp. at 210-11 (footnote omitted). Without question, acceptance of a self-concealing conspiracy argument could exacerbate the stale evidence problem by permitting proof of the conspiracy after such proof was so stale as to be completely unreliable.

On the other hand, *King & King Enterprises* demonstrates that requiring affirmative acts of concealment does not avoid the stale evidence problem. Since the affirmative acts of concealment in *King & King Enterprises* occurred during, or shortly after, the alleged price fixing activities, proof of the acts of concealment would be as stale as proof of the underlying activity. Thus, while we cannot ignore the stale evidence problem, it is not sufficient, standing alone, to preclude use of a self-concealing conspiracy to support a fraudulent concealment claim.

Stale evidence is a problem because, after the statute of limitations has run, a defendant is subject to a greater risk of being required to answer on a claim after exculpatory evidence has been lost or destroyed. At that point, defendant bears a greater risk of an erroneous decision. Ancient chancery courts faced a similar situation. They "faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. Concerned that claims would be fabricated, [they] imposed a more demanding standard of proof." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388 n.27 (1983) (citation omitted). In fact, the very purpose served by the standard of proof is

> to allocate between the litigants the risk of erroneous decision. When the standard applied is a mere preponderance of the evidence, the litigants share the risk

> of error in roughly equal proportion. If a substantial individual interest is at stake, a portion of the risk of erroneous decision-making is shifted away from the individual through application of the clear and convincing standard.

SEC v. First Fin. Group, 645 F.2d 429, 434 (5th Cir. Unit A May 1981) (citing *Addington v. Texas,* 441 U.S. 418, 423 (1979)); *see also Disner v. Westinghouse Elec. Corp.,* 726 F.2d 1106, 1111 (6th Cir. 1984) (clear-and-convincing-evidence standard "guards against risk of error"). Thus, a higher standard of proof can shift the risk of error from defendant to plaintiff and alleviate the very problem created by stale evidence.

A higher standard of proof is appropriate for proof of a self-concealing conspiracy argument. The higher standard reflects a decision that the status quo is preferable to any change, and thus the party seeking change should bear "most, though not all, the risk of erroneous decision[s]." *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984). A plaintiff seeking to invoke fraudulent concealment is bringing its action after the statute of limitations has run. Acceptance of the fraudulent concealment argument will result in a tolling of the statute. Given the importance of statutes of limitations, courts should avoid tolling them except in limited situations. Increasing the burden on the party seeking to toll the statute will help to preserve the status quo. This argument is most compelling when the fraudulent concealment claim is based on a self-concealing conspiracy. Because the plaintiff rests its fraudulent concealment claim on evidence as stale and unreliable as evidence supporting the conspiracy claim, tolling the statute revives the very risk that the statute of

limitations was enacted to prevent. Thus, some mechanism is needed to shift that risk back to the plaintiff. The higher standard of proof accomplishes that purpose.

The nature of a fraudulent concealment claim also supports a higher standard of proof. In *Bailey,* the Supreme Court decided that a litigant should not be allowed to commit a fraud—conceal plaintiff's cause of action—and then make that fraud "successful and secure" by pleading a provision of the law designed to prevent fraud —statutes of limitations. *Bailey v. Glover,* 88 U.S. at 349. To avoid that anomaly, the Court adopted the fraudulent concealment tolling doctrine. The basis for the doctrine was fraud. While it has been expanded to include activities that are not within the general definition of fraud, the courts have retained some of the similarities. For instance, a party seeking to invoke fraudulent concealment must plead the facts giving rise to the claim with specificity and particularity, the same requirement as fraud pleadings. We now carry the analogy one step further. Not only do the fraud pleading requirements apply, but the fraud standard of proof—clear and convincing evidence—also applies to fraudulent concealment when the fraud is a self-concealing conspiracy.

We, therefore, conclude that plaintiff, in its attempt to escape the statute of limitations, should be permitted to base its fraudulent concealment claim on proof of a self-concealing conspiracy. However, we hold that plaintiff must prove the existence of the conspiracy, the self-concealing nature of the conspiracy and defendant's participation in the conspiracy by clear and convincing evidence. In cases involving tolling based on a self-concealing theory, the proof of the merits and the proof of tolling are

the same, and thus, in effect, the higher standard of proof applies both as to tolling and liability. In this manner plaintiff is permitted to maintain its claim but also bears most of the burden of an erroneous decision.

D. Plaintiff's Proof of Self-Concealing Conspiracy

The district court granted defendant's motion for summary judgment and denied plaintiff's motion for partial summary judgment. Plaintiff claims that the district court erred because defendant engaged in a bidrigging conspiracy, and the statute of limitations should be tolled under a fraudulent concealment analysis. The only element of fraudulent concealment at issue in this case is whether defendant used fraudulent means to conceal plaintiff's cause of action. To prevail, plaintiff must prove by clear and convincing evidence that a bidrigging conspiracy existed, that the bidrigging conspiracy is a self-concealing conspiracy, and that defendant participated in the conspiracy. At the summary judgment level,

> we must view the case in the same manner as did [the district court]. *See Western Casualty & Surety Co. v. National Union Fire Ins. Co.*, 677 F.2d 789, 791 n.1 (10th Cir. 1982); *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1377 (10th Cir. 1980). . . . [W]e must determine whether any genuine issue of material fact exists and, if not, whether the substantive law was correctly applied. *See* Fed. R. Civ. P. 56(c); *Western Casualty, supra.* In doing so, we must view the record . . . in the light most favorable to the party opposing the motion.

Gomez v. American Elec. Power Serv. Corp., 726 F.2d 649, 651 (10th Cir. 1984). Thus, in deciding whether plaintiff is entitled to summary judgment on the statute of lim-

itations issue, we must consider the evidence in the light most favorable to defendant. And in deciding whether defendant is entitled to summary judgment, we must consider the evidence in the light most favorable to plaintiff.

The Supreme Court also stated that in considering a summary judgment motion, we must consider the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, —, 106 S. Ct. 2505, 2513 (1986). Consequently, in determining whether a genuine issue as to a material fact exists, we must decide whether the evidence is sufficient to put the fact in issue under a clear-and-convincing-evidence standard. Defendant is entitled to summary judgment if it can show that plaintiff has not presented evidence that a jury could find, under the higher standard of proof, supports a decision that defendant engaged in a self-concealing conspiracy. On the other hand, plaintiff is entitled to summary judgment only if it shows that existence of the conspiracy is established even under a clear-and-convincing-evidence standard.

Plaintiff's proof of the existence of the conspiracy is strong. In fact, defendant does not deny that a conspiracy existed but rather denies that it was involved in any conspiracy if it did exist. Mr. Corn testified that a bid-rigging conspiracy existed on the Newcastle project and pleaded guilty to charges that he participated in that conspiracy. Even when he was unable to remember the details of the conspiracy, Mr. Corn was sure that such a conspiracy existed and that his company benefited from the bidrigging. Furthermore, Mr. Popejoy testified that he violated antitrust laws on the Lamar project. He de-

cided to call all potential bidders on the project, and after finding that none was "interested," he submitted his bid without further reducing the bid amount. Mr. Popejoy also testified that he gave a complementary bid and received $10,000 compensation for that bid on the Parker Road project. While no direct evidence linked the bidrigging on the Newcastle project with the bidrigging on the Lamar and Parker Road projects, the nature of a bidrigging conspiracy would permit the jury to find that a complementary bid on the first project may be repaid on one of the later projects. This would support a finding of a conspiracy. Even applying a clear-and-convincing-evidence standard, plaintiff has presented sufficient evidence, if believed, to show existence of a conspiracy.

We now turn to the question of whether a bidrigging conspiracy is a self-concealing conspiracy. If a bidrigging conspiracy exists, it must remain concealed to be successful. Any knowledge of the conspiracy would lead plaintiff to seek action immediately and result in collapse of the conspiracy. Furthermore, unlike many conspiracies, a bidrigging conspiracy is likely to exist for an extended period of time. To be attractive to all bidders, the conspiracy must cover more than one job—or must provide some quid pro quo to the "losing" bidders. The very nature of a bidrigging conspiracy makes it likely that future bids will also be rigged. Mr. Corn testified that he told Mr. Stillman that "we . . . would be willing to give him a future job. And he agreed and just said that we owed him one . . . . " Deposition of Larry Wallace Corn, record, vol. 2, at 117. These additional bidrigging activities not only provide the compensation for one of the "losing" bidders in the original bid but also help to conceal

the bidrigging activity on the other bids. Such subsequent fraudulent acts may in themselves amount to affirmative acts of concealment. *See Blanchette v. Cataldo,* 734 F.2d 869, 876 (1st Cir. 1984). In any event they show that a bidrigging conspiracy, if it exists at all, is *per se* self-concealing. Plaintiff has, therefore, satisfied the requirement of presenting evidence which, if believed, proves the conspiracy was self-concealing.

Proof of defendant's participation is much more troubling. Defendant's representatives explicitly denied any participation in illegal activities, and the only party with whom Mr. Corn allegedly conspired, Harold Stillman, is dead and cannot testify. Thus, the only evidence of defendant's participation in the conspiracy was Mr. Corn's testimony. Mr. Corn testified that he contacted defendant and that Mr. Stillman agreed to go along with the bidrigging scheme. But he also testified that this was the only contact he had with defendant and that defendant never asked Corn Construction to submit a complementary bid in return for defendant's bid on the Newcastle project. This evidence does not satisfy plaintiff's burden of showing that defendant participated in the bidrigging scheme as a matter of law. In a similar manner, Mr. Popejoy's testimony does not provide such clear and convincing proof of defendant's participation in a bidrigging scheme that plaintiff is entitled to summary judgment. Mr. Popejoy's allegations relating to any conversation with Mr. Walters are denied by Mr. Walters, and Mr. Popejoy admitted that defendant never asked for a complementary bid from Popejoy Construction. A jury could decide that defendant never participated in any bidrigging scheme. Thus, plaintiff is not entitled to summary judgment, and

we affirm the district court's decision denying that motion.

The more difficult question is whether defendant is entitled to summary judgment. To escape summary judgment for defendant, plaintiff must show that a genuine issue of material fact exists as to defendant's participation in a bidrigging conspiracy. Furthermore, the evidence must create that issue under a clear-and-convincing-evidence standard. Mr. Corn's testimony is reasonably clear. He specifically testified that he contacted Mr. Stillman, obtained Mr. Stillman's agreement to participate in the scheme and told Mr. Stillman Corn Construction's bid. Moreover, the bid tabulation shows that on the Newcastle project defendant did submit a bid higher than Corn Construction. In addition, Mr. Popejoy specifically recalled the conversation with Mr. Walters. While Mr. Walters denied the essence of the conversation, claiming that he told Mr. Popejoy that defendant was getting out of bidding on projects outside the Denver metropolitan area, defendant submitted a bid on the Lamar project. Submission of a bid when he claimed to be getting out of that type of project may undermine Mr. Walters' credibility.

Even under a clear-and-convincing-evidence standard a jury could infer that defendant agreed to join the conspiracy and participate in the bidrigging. Thus, we conclude that defendant has not shown at this stage that there is no genuine issue as to any material fact.

III. Attorney's Fees

Defendant appeals the district court decision denying it attorney's fees. A decision on attorney's fees will be

reversed only if the trial court abused its discretion. *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985). Given our determination on the merits that plaintiff is entitled to tolling under the fraudulent concealment doctrine if it can prove a self-concealing conspiracy, plaintiff's claim was not frivolous. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant attorney's fees.

Accordingly, we REVERSE the granting of defendant's motion for summary judgment and REMAND for proceedings consistent with this opinion.

86-1363, 86-1420—State of Colorado ex rel. Colorado Attorney General Duane Woodward v. Western Paving Construction Co.

ANDERSON, Circuit Judge, concurring.

I concur in the result in this case because as a practical matter it is required by this court's opinion in *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

I would not go so far as to adopt the self-concealing fraud concept. "Self-concealing" is too amorphous. I prefer to maintain the requirement that a plaintiff show affirmative acts of concealment, although I would allow such acts to be part of the substantive misdeed. The justification for tolling the statute of limitations when there are affirmative acts of concealment independent of the underlying cause of action applies equally to acts of concealment which are also part of the cause of action. The

defendant is not permitted to be rewarded, nor the diligent plaintiff punished, by the defendant's successful design to frustrate discovery of the wrong until the statute bars redress.

However, the extent of this creeping judicial alteration of the statute must be recognized. Since conspiracies are secret by nature, our holding moves another step closer to eliminating any time bar for an undisclosed conspiracy, leaving only questions of the plaintiff's knowledge and diligence for activating the statute. *See Hall v. E. I. DuPont DeNemours & Co.*, 312 F. Supp. 358 (E.D. N.Y. 1970). The few arguments to the contrary are unpersuasive. *See F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422, 429 n.4 (N.D. Ohio 1984). Surely Congress could have fashioned the statute to run from the time of discovery if it had so desired, and it is not likely that the statute as written was intended to be the exception to a judicial rule. Over 100 years have passed since the Supreme Court spoke the words supposedly validating the "self-concealing" fraud rule in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), with a significant lack of acceptance of that rule by lower courts. The fact that most courts have required independent affirmative acts of concealment,[1] when adoption of a self-concealing fraud rule would have eliminated most of their labors on the facts

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[1] *See, e.g., Rutledge v. Boston Woven Hose and Rubber Co.*, 576 F.2d 248 (9th Cir. 1978); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *City of Philadelphia v. Nucero Corp.*, No. 86-3628, slip op. (E.D. Pa. March 17, 1987) ("[m]ost courts have required a showing of an affirmative act of concealment by the defendant that is independent of the underlying wrong."); *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885 (M.D. Pa. 1985).

and disposed of or eliminated much of the litigation in this area, makes a powerful point, albeit by inference.

While ample justification exists for staying the statute in the face of defendants' calculated secrecy, it must be remembered that statutes of limitation are consciously arbitrary, and serve a social purpose by being so. All those considerations are the business of Congress, not the courts.

Adoption here of concealment in and of itself as the test for tolling, even when that concealment is coupled with intent and affirmative acts constituting a substantive wrong, still does not provide a satisfactory line of demarcation. Malefactors avoid consequences by seeking and keeping act, actor, or both secret. Such secrecy is, as it were, a "fraud" on the victim, whose recovery is stymied by an inability to know the act or discover the actor. Yet no one would venture that all statutes of limitation are or should be judicially amended to commence when the plaintiff at last discovers (after "due" diligence) that a wrong has been committed and by whom. Perhaps that is why most courts to date have adhered to the independent affirmative acts rule. That rule offers a test short of concealment in and of itself, i.e. it requires two separate wrongs: the underlying misdeed plus the further misdeed of the cover-up. That requirement of two wrongs also broadens the plaintiff's evidentiary burden when bringing an action after the statutory period, thus providing some additional protection to defendants faced with the necessity of defending a charge on stale evidence. In this case and *King and King*, the evidentiary base is narrowed to the substantive wrong. The balance is somewhat re-

stored by the clear and convincing standard imposed by the majority, and I hope that trial courts are liberal in granting dispositive motions at any appropriate stage of the proceedings where it appears that a plaintiff's case cannot fairly clear that hurdle because of the passage of time.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-A-1483

STATE OF COLORADO, ex rel.
Colorado Attorney General
Duane Woodard,

Plaintiff,

v.

WESTERN PAVING CONSTRUCTION CO.,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed March 3, 1986)

ARRAJ, District Judge

I. BACKGROUND

On July 19, 1984, the State of Colorado filed this civil antitrust action against Western Paving Construction Company ("Western Paving"), an asphalt-paving construction firm in the Denver area, alleging violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1980), and the Colorado state antitrust laws.[1]. In the Sherman Act claim, plaintiff alleges that Western Paving conspired with other road paving firms to rig bids for

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1. On September 7, 1984, I granted Western Paving's Motion to Dismiss the state antitrust count, rejecting plaintiff's claims of pendent jurisdiction.

Colorado highway construction projects. Plaintiff alleges in the complaint that the conspiracy existed "as early as January 1971" and extended "at least to sometime in 1978." Because the complaint does not allege a conspiracy within the four-year statute of limitations period, *i.e.*, 1980-1984, the complaint alleges that the statute of limitations should be tolled due to Western Paving's fradulent concealment of the conspiracy. After much discovery, including depositions, interrogatories and other extensive document discovery, Western Paving filed this Motion to Dismiss for Failure to Comply with Rule 11 and this Motion for Summary Judgment. In support of its Motion to Dismiss, Western Paving asserts that the complaint lacks any factual or legal basis and was filed without reasonable inquiry, "in flagrant disregard" of the requirements of Rule 11 of the Federal Rules of Civil Procedure. Defendant prays for attorneys' fees and costs, as provided for under Rule 11. In its Motion for Summary Judgment, which was evidently filed as an alternative to the Motion to Dismiss, Western Paving asserts that, as a matter of law, it did not conspire to rig highway project bids, at any time, and even if it had, the State has failed to establish the necessary elements of fraudulent concealment to toll the statute of limitations. In response to these motions, the State filed this Motion for Partial Summary Judgment. In is motion, the State contends that it is undisputed that Western Paving participated in a conspiracy to rig the bids on a particular highway project in 1971 (the Newcastle Easterly project) and that defendant's fraudulent concealment of the 1971 conspiracy tolls the four-year statute of limitations at least through August 1980. In support of its motion, the State has submitted the deposition testimony of Larry Corn, of Corn Construc-

tion Company. Mr. Corn testified that he contacted the president of Western Paving, Harold Stillman, and asked him to submit an inflated bid for the 1971 Newcastle Easterly job so that Corn Construction would get the job. According to Mr. Corn, Mr. Stillman agreed to submit a complementary bid.

The parties have thoroughly briefed all of the issues presented in these motions, and have submitted voluminous appendices containing affidavits, deposition transcripts and other documentation. Under these circumstances, I find that oral argument would be of no meaningful assistance. For the reasons set forth herein, plaintiff's Motion for Partial Summary Judgment is denied, defendant's Motion to Dismiss is denied and defendant's Motion for Summary Judgment is granted.

II. TOLLING OF STATUTE OF LIMITATIONS

Even if the State is able to establish that Western Paving participated in a conspiracy in 1971, the State must overcome defendant's claim that the statute of limitations bars recovery for a conspiracy which took place more than 13 years prior to the filing of the complaint. Section 4B of the Clayton Antitrust Act, 15 U.S.C. § 15b (1985 Cum. Supp.), requires that federal antitrust actions be commenced within four years of the date the cause of action accrued. 15 U.S.C. § 15b. Under this general rule, the statutory period has run on claims based on facts occurring prior to July 1980, four years prior to the filing of the complaint in this action. To overcome this defense, the State relies on the federal doctrine of equitable tolling.

The equitable tolling concept was enunciated by the Supreme Court in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342

(1874). In that case, the Court recognized two situations in which the "strict letter of general statutes of limitation" will not be followed. First, the Court stated that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in *concealing* the facts from the other, the statute will bar relief." In the alternative, the Court stated "where the party injured by the fraud remains in ignorance of it without any fault or want of *diligence* or care on his part, the bar of the statute does not begin to run until the fraud is discovered." 88 U.S. at 348. These two concepts set forth by the Court in *Bailey* have come to be known as the "concealment" and "diligence" elements of the equitable tolling doctrine. See *Long v. Abbott Mortgage Corp.*, 459 F.Supp. 108, 113 (D.Conn. 1978). In *Bailey*, which involved a claim for common law fraud, the Court recognized that the statute of limitations would be tolled if the plaintiff established either the defendant's concealment or the plaintiff's diligence.

The courts have applied the equitable tolling doctrine differently, depending upon the circumstances and underlying facts of each case. In actions based on fraud, the courts have continued to apply the test set forth in *Bailey*, *i.e.*, tolling requires proof of either plaintiff's diligence or defendant's concealment. See *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975); *Seiffer v. Topsy's International, Inc.*, 487 F. Supp. 653 (D.Kan. 1980). However, in antitrust actions, the majority of the Circuits, including the Tenth Circuit, have developed a more stringent test for tolling the statute of limitations. To invoke the equitable tolling doctrine in the antitrust context, a plaintiff must plead and prove

three elements: (1) affirmative acts of concealment by the defendant; (2) successful concealment from the plaintiff; *and* (3) plaintiff's due diligence until discovery of the facts. See *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (Involving cause of action for alleged violations of Sherman Act); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 1765 (1985) (Sherman Act); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979) (Sherman Act); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) (Sherman Act); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (Sherman and Clayton Acts); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460 (2d Cir. 1974) (Clayton Act). Fraud cases are treated differently because the original fraud is itself an act of concealment and is considered to be inherently more difficult for a plaintiff to discover. See *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) ("[T]o toll the statute there must be affirmative acts or misrepresentations . . . . If, however, plaintiff's cause of action is based on fraud, a different rule would apply. The original fraud is regarded as a 'continuing affirmative act, and mere silence of the defendant is treated as a concealment.' ") Therefore, in antitrust cases, the equitable tolling doctrine requires proof of both the concealment and diligence elements.

The concealment element requires proof that the defendant engaged in *affirmative* conduct designed to lead a reasonable person to believe that he did not have a claim for relief. See *Rutledge v. Boston Woven Hose & Rubber*

Co., 576 F.2d 248 (9th Cir. 1978). The diligence element imposes a positive duty on the plaintiff to use diligence in discovering its cause of action within the limitations period. *Dayco v. Goodyear Tire & Rubber Co., supra*, 523 F.2d at 394. Unawareness of facts or law, alone, does not justify suspending of the operation of the statute. *Long v. Abbott Mortgage Corp., supra*, 459 F.Supp. 108, 117.

The State erroneously argues in its brief that it is not required to prove affirmative acts of concealment by Western Paving to toll the statute of limitations. The State evidently contends that proof of its due diligence, alone, is sufficient. The cases cited by plaintiff in support of this argument involve underlying actions for fraud.[2] As stated earlier, courts have historically not required proof of both defendant's concealment and plaintiff's diligence in fraud cases. Therefore, these cases are inapposite to the instant antitrust action. Plaintiff also relies on a misconstrued reading of *King & King Enterprises v. Champlin Petroleum Co., supra*, 657 F.2d 1147. In *King & King*, the Tenth Circuit Court of Appeals stated:

> The party asserting the fraudulent concealment doctrine has the burden of showing (1) the use of fraudulent means by the party who raises the bar of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action.

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2. Plaintiff cites *Bailey v. Glover, supra; Holmberg v. Armbrecht, supra;* and *Ohio v. Peterson, Lowrey, Rall, Barber and Ross*, 651 F.2d 687 (10th Cir. 1981) (Securities fraud). (See Plaintiff's Reply Brief at 8.)

657 F.2d at 1154. The Court's decision to toll the statute was specifically based on a finding that "the defendant actively sought to conceal its price fixing activities." 657 F.2d at 1156. The State's assertion that *King & King* does not require proof of affirmative acts of concealment is based on *dicta* and is contrary to the holding in that case and the weight of authority in the antitrust area.[3]

With respect to affirmative acts of concealment in this case, the State has alleged, through its investigator James C. Miller, that the fraudulent concealment argument is based on the following affirmative acts: (1) Larry Corn's submission of false noncollusion affidavits in connection with the 1971 Newcastle Easterly job; and (2) Western Paving's representative falsely denying any wrongdoing during a May 1982 interview with the Colorado Department of Highways. (See Appendix to Memorandum of Defendant Western Paving Construction Company in Support of its Motion for Summary Judgment, at Exhibit 6, p. 4, and Exhibit 9, p. 118).

With regard to the noncollusion affidavits, the State alleges that Mr. Corn submitted, along with Corn Construction Co.'s bid, an affidavit stating that he had not

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3. Plaintiff relies on *dicta* in *King & King* in which the Court discussed a Temporary Emergency Court of Appeals case in which that court stated that a defendant's conduct can sometimes be "inherently self-concealing," thus dispensing with the requirement of proof of affirmative acts of concealment. However, this *dicta* is directly contrary to the holding in *King & King* and the Court's statement that "[O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing . . . that some *affirmative act* of fraudulent concealment frustrated discovery notwithstanding [the plaintiff's] diligence." 657 F.2d at 1154-1155 (Emphasis added) (Citing trial court's opinion).

been involved in collusive activities while bidding the 1971 Newcastle Easterly job. This allegation is based on the deposition testimony of Mr. Corn. (See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at Exhibit A). At the outset, the State has failed to establish that his act of Larry Corn should be imputed to Western Paving. Nevertheless, the submission of an allegedly false noncollusion affidavit is, at most, a failure to disclose or denial of wrongdoing. Such denial does not amount to an affirmative act of concealment. See *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cases (CCH) ¶ 62,894 at p. 79,179 (E.D.Wa. 1979) ("[N]on-collusion affidavits . . . amount to no more than a denial of wrongdoing, which does not constitute fraudulent concealment.") See also *Board of Education of Evanston v. Admiral Heating and Ventilation, Inc.*, 94 F.R.D. 300 (N.D. Ill. 1982). The plaintiff's other ground for asserting fraudulent concealment, the denial of wrongdoing by Alvin Walters of Western Paving, also does not amount to an affirmative act of concealment. The courts, including the Tenth Circuit, have universally held that denial of wrongdoing does not constitute fraudulent concealment. See *King & King, supra*, 657 F.2d at 1155 ("A denial of an accusation of wrongdoing does not constitute fraudulent concealment.") (Citing trial court's opinion). See also *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F.Supp. 546 (N.D.Ohio 1974), *aff'd.* 523 F.2d 389 (6th Cir. 1975).

In its Reply Brief, the State has asserted various additional "affirmative acts of concealment" to bolster its fraudulent concealment argument. For example, plaintiff alleges that "Stillman of Western Paving did not disclose the existence of the conspiracy on the Newcastle

project to individuals inside the company who were not involved in the conspiracy." Even if this allegation were true, the Tenth Circuit has specifically stated that "mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment." *King & King, supra,* 657 F.2d at 1155 (citing trial court's opinion). Plaintiff also asserts that Western Paving committed an affirmative act of concealment by submitting a complementary bid on the 1971 project which had the appearance of regularity, thereby helping to conceal the lack of true competition in the bidding process. This type of action does not constitute fraudulent concealment. See *In re Fertilizer Antitrust Litigation, supra* at p. 79,178 ("Bids that had the appearance of regularity and their submission, which allegedly inferred that the bids were complete and regular, are not affirmative acts aimed at fraudulent concealment . . . ; such acts are at best passive conduct of concealment, if not simply silence.") See also *Board of Education of Evanston v. Admiral Heating, supra.* Finally, the State asserts as an affirmative act of concealment that Mr. Corn "made a list of competitiors with their phone numbers to whom he placed telephone calls [requesting that they submit complementary bids] . . . in total privacy and did not inform anybody about them until 1983." (See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 13). These activities are not acts of concealment, but rather are the acts taken in carrying out the conspiracy itself. Fraudulent concealment occurs when a defendant takes affirmative steps in addition to the original wrongdoing to prevent the plaintiff from discovering the wrong. *Board of Education of Evanston v. Admiral Heating, supra,* 94

F.R.D. at 302 ("All the alleged 'means and methods' of concealment were themselves the essence of each 'commission of the fraud' and *not* post-fraud cover-ups.") (Emphasis in original). See also *McConnell v. Frank Howard Allen & Co.*, 574 F.Supp. 781, 787 (N.D.Cal. 1983). In sum, the State has failed to allege any facts which constitute affirmative acts of concealment for purposes of the tolling doctrine.

This is a classic case in which the statute of limitations should be given effect. The facts forming the basis for plaintiff's claim occurred over 13 years prior to the filing of the complaint.[4] The State's case is based almost entirely on the testimony of one witness, Larry Corn. His testimony cannot be corroborated because the only Western Paving employee with whom he "conspired," Harold Stillman, is now deceased. Both parties admit that many, if not all, of the relevant documents, including the noncollusion affidavits, bid proposals and other documents relating to the bidding process, have been destroyed pursuant to normal record retention policies. As the Supreme Court observed in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879): "Statutes of limitations are vital to the welfare of society and are favored in the law."

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4. In its briefs, the State refers to the possibility that Western Paving was involved in bidrigging on a 1978 project. However, the State's investigator stated in his deposition that the State does not have any facts, knowledge or information with respect to bidridding by Western Paving on this 1978 job. (See Appendix to Memorandum of Defendant Western Paving Construction Company in Support of its Motion for Summary Judgment, Exhibit 9 at p. 140). The only conspiracy for which the State has presented factual support against Western Paving is the 1971 Newcastle Easterly job.

Moreover, "[s]tale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Dayco Corp. v. Goodyear Tire & Rubber Co., supra,* 523 F.2d at 394.

Plaintiff has failed, as a matter of law, to establish that Western Paving has committed any affirmative acts of fraudulent concealment.[5] Therefore, plaintiff's claim under Section 1 of the Sherman Act is barred by the applicable four-year statute of limitations.

III. MOTION TO DISMISS

As an alternative to its Motion for Summary Judgment, defendant filed this Motion to Dismiss for failure to comply with Rule 11 of the Federal Rules of Civil Procedure. Under Rule 11, the signature of an attorney or party on a pleading certifies that "to the best of his knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact and is warranted by existing law." Fed.R.Civ.P. 11. Relief under Rule 11 is discretionary and requires a showing that the plaintiff's claim is not simply lacking in merit, but bordering on frivolity. *Nemeroff v. Abelson,* 469 F.Supp. 630, 640 (S.D.N.Y. 1979).

In this case, plaintiff's failure to survive a motion for summary judgment does not imply that plaintiff's claims are frivolous or brought for some ulterior purpose. The State has submitted the affidavit of its attorney,

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5. Because I find that plaintiff's fraudulent concealment argument fails on this basis (*i.e.,* insufficient proof of affirmative acts), I need not consider whether plaintiff has satisfied the due diligence requirement.

Thomas P. McMahon, which states that Mr. McMahon interviewed Larry Corn on several occasions prior to filing this law suit. In those interviews, Mr. Corn provided information concerning Western Paving's involvement in the Newcastle Easterly job. It is clear that the State made a reasonable inquiry, for purposes of Rule 11, and that this law suit is not frivolous or brought in bad faith. With the benefit of hindsight, after the completion of discovery, it is apparent that the State faced insurmountable obstacles in this case, but I am satisfied that competent counsel would have pursued this litigation with justifiable expectations of some success. See generally *Erie Conduit Corp. v. Metropolitan Asphalt Paving Assoc.*, 106 F.R.D. 451 (E.D.N.Y. 1985) (Following dismissal of action, court denied Rule 11 Motion in antitrust case involving rigged bids for road paving contracts). Under these circumstances, imposition of sanctions would go far beyond the goals of Rule 11. Therefore, defendant's request for attorneys' fees, costs and any other relief under Rule 11 is denied.

Accordingly, IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment be, and the same hereby is, DENIED;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED;

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, DENIED.

The Clerk is directed to prepare and enter judgment in favor of Western Paving Construction Co. and against

the State of Colorado. Each party shall bear its own costs.

DATED at Denver, Colorado this 3rd day of March, 1986.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-A-1483

STATE OF COLORADO, ex rel.
Colorado Attorney General
Duane Woodard,

Plaintiff,

v.

WESTERN PAVING CONSTRUCTION CO.,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Judge Alfred A. Arraj and filed this day, it is

ORDERED that Plaintiff's Motion for Partial Summary Judgment be, and the same hereby is, DENIED; it is

FURTHER ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED; and it is

FURTHER ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, DENIED.

Each party shall bear its own costs.

DATED at Denver, Colorado, this 3rd day of March, 1986.

JAMES R. MANSPEAKER, Clerk

by /s/ Stephen P. Ehrlich
STEPHEN P. EHRLICH, Chief Deputy

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2027

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

STATE OF COLORADO ex rel: Colorado Attorney General Duane Woodard,

Petitioner,

V.

WESTERN PAVING CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

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INTRODUCTION

The States of Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia (hereinafter "Amici States") submit this brief in support of the State of Colorado's Petition for a Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty to enforce their states' antitrust laws, as well as the federal antitrust laws. In addition, they represent their states and political subdivisions in treble damage actions under the federal antitrust laws and are authorized by law to bring such actions as *parens patriae* on behalf of the natural citizens of their states.[1]

The Amici States, in their capacity as *parens patriae*, play a major role in federal antitrust enforcement. Moreover, the states' own antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[2] Therefore, the Amici States have a

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[1] 15 U.S.C. § 15c (1988).

[2] *E.g.*, Del. Code Ann. tit. 6, § 2113 (1986); Fla. Stat. § 542.32 (1987); Ill. Rev. Stat. ch. 38, para. 60-11 (1987); Me. Rev. Stat. Ann. tit. 10, § 1101 (1980); Neb. Rev. Stat. § 59-829 (Reissue 1984); N.J.

(footnote continued on next page)

substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States also enforce state competitive bidding statutes. States spend millions of dollars yearly under such statutes. The holding by the district court in *Western Paving* undermines the very purpose and effectiveness of competitive bidding.

The Amici States support the contention of the State of Colorado that a plaintiff invoking the doctrine of fraudulent concealment meets the first prong of the doctrine by proving the existence of a self-concealing conspiracy. The *Western Paving* court requires a plaintiff relying upon the doctrine of fraudulent concealment to prove that the defendant took affirmative steps, separate and apart from the original wrongdoing, to prevent the plaintiff from discovering a bidrigging cause of action. The "separate and apart" standard applied by the *Western Paving* court encourages fraudulent conduct, undermining the very purpose for which statutes of limitation were created. The State of Colorado's contention, in contrast, promotes sound antitrust policy and effective enforcement of the antitrust laws.

The Amici States' interest is illustrated by a bidrigging case currently pending on appeal entitled *Texas v. Allan Construction Co.* The United States

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(footnote continued from previous page)
Stat. Ann. § 56:9-18 (1988); Okla. Stat. tit. 79, § 1 *et seq.* (1981); S.D. Codified Laws 37-1-22 (1988); Tex. Bus. & Comm. Code § 15.04 (1988) (to the extent consistent with the purpose of maintaining and promoting economic competition in trade and commerce and to provide the benefits of such competition to consumers in Texas); Wash. Rev. Code § 19.86.920 (1985).

District Court for the Western District of Texas granted the *Allan* defendants' motion for summary judgment and dismissed the lawsuit on the basis that limitations had run. The *Allan* court held that the statute of limitations is tolled only by a finding that the bidriggers concealed their wrongful bidrigging scheme by affirmative acts, separate and apart from the fraud[3] itself. A Fifth Circuit panel heard oral argument in the *Allan* case on May 2, 1988; no decision has yet been rendered. Other decisions have been handed down by various state and federal courts construing a state's right to invoke the doctrine of fraudulent concealment.[4] These decisions further illustrate the concrete nature of the Amici States' interest and the doctrine's impact on the states' ability to prosecute bidriggers.

SUMMARY OF ARGUMENT

Western Paving offends public policy and sets dangerous precedent. The standard imposed under *Western Paving* rewards conspirators for the successful concealment of their conspiracies. Furthermore, it puts an antitrust plaintiff to the generally impossible burden of pleading and proving that a bidrigger took an affirmative act to cover up that which by its very nature is already concealed.

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[3]Federal courts have explicitly ruled that concealment of the *per se* antitrust violation of price fixing is equivalent to fraud. *See infra* II. B.

[4]*See e.g., New York v. Hendrickson Brothers. Inc.*, 840 F.2d 1065 (2d Cir. 1988), *petition for cert. filed*, No. 88-21 (U.S. July 2, 1988); *Colorado ex rel. Woodard v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) para. 67,473 at 59,984 (D. Colo. 1987); *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885 (M.D. Pa. 1985); *Nebraska v. Land Paving Co.*, No. CV-85-L-387 (D. Neb 1985) (unreported).

In *Bailey v. Glover*, this Court established the doctrine of fraudulent concealment, which tolls federal statutes of limitation in cases involving fraudulent conduct. *Bailey* held that a plaintiff could invoke the doctrine when the fraud was concealed or was inherently self-concealing.

The doctrine has been read into every federal statute of limitation, including federal antitrust statutes. In order to invoke the doctrine of fraudulent concealment and toll limitations, an antitrust plaintiff must plead and prove three elements.[5] The dispute in *Western Paving*, an antitrust bidrigging case, concerns the concealment element: whether defendant concealed the conduct which forms the basis of the cause of action.

This Court has not considered the doctrine of fraudulent concealment as it applies to an antitrust bidrigging case. At the appellate and district court levels, case law on the doctrine of fraudulent concealment in antitrust cases is inconsistent, confusing, and vague. Federal courts have applied three conflicting standards to satisfy the concealment element of the fraudulent concealment doctrine: (1) the self-concealing conspiracy standard; (2) the affirmative acts standard; and, (3) the affirmative acts, separate and apart, standard. *Western Paving* adopted the affirmative acts, separate and apart, concealment standard.

Western Paving cannot be reconciled with *Bailey* and other Supreme Court precedent since bidrigging conspiracies are inherently self-concealing and equivalent to fraud; nor can it be reconciled with several appellate and district court decisions including a recent

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[5]The three elements of the fraudulent concealment doctrine are set forth *infra* at II. A.

decision from the United States Court of Appeals for the Second Circuit. Because case law in this area of the law is hopelessly confused and because of the public policy implications of the *Western Paving* decision, this Court should grant the Petition of Certiorari filed herein by the State of Colorado.

ARGUMENT

I. THE HOLDING IN *WESTERN PAVING* DEFIES SOUND LOGIC AND PUBLIC POLICY AND ENCOURAGES FRAUDULENT CONDUCT BY THOSE BIDDING ON GOVERNMENT CONTRACTS.

Western Paving sets dangerous precedent. The district court in *Western Paving* holds that a bidrigger must engage in separate and affirmative acts of concealment beyond participation in the submission of complementary bids[6] and the false swearing of affidavits of noncollusion in order to toll the statute of limitations. *Colorado v. Western Paving Construction Co.*, 630 F. Supp 206, 210 (D. Colo. 1986), *aff'd by an equally divided court*, 841 F.2d 1025 (10th Cir. 1988), *petition for cert. filed*, No. 87-2027 (U.S. June 8, 1988). This holding defies sound logic and public policy and encourages fraudulent conduct by those bidding on government contracts.

Acts such as the submission of complementary bids or false non-collusion affidavits are not essential elements of the underlying cause of action. Such acts,

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[6]A complementary bid is an intentionally high bid "designed to deceive state officials into believing that the project had been bid competitively." *United States v. Young Bros., Inc.*, 726 F.2d 682, 685 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1985).

therefore, logically go beyond the conspiracy itself, contrary to the district court's holding in *Western Paving*.[7]

Furthermore, the *Western Paving* decision conflicts with sound public policy by frustrating the competitive sealed bid procedures historically used by governmental purchasers. Competitive bidding statutes are designed to safeguard the integrity of and promote public confidence in government purchasing decisions. By allowing a state to gain the benefits of a competitive marketplace, such statutes save tax dollars. The competitive sealed bid format is widely accepted as being the fairest, simplest, and most efficient method to extend the benefits of the competitive marketplace to the government procurement process. The district court's holding in *Western Paving* undercuts the reliability of the competitive sealed bid system, making it impossible for government purchasers to rely upon the appearance of competition from sealed bids and sworn affidavits of noncollusion as evidence of the bidders' good faith. Instead, government purchasers will have to proceed "from the outset as if [they] were dealing with thieves."[8]

Finally, the stringent tolling standard set forth in *Western Paving* will encourage potential conspirators to break the law by making it less likely that they will suffer adverse consequences if caught. Instead of

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[7]The substantive wrong which constitutes a violation of the Sherman Act in the bidrigging context is the agreement between two or more competitors to allocate a bid contract. Once competitors designate by agreement who will submit the lowest bid, the violation of Section One of the Sherman Act is complete. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982).

[8]*Hudak v. Economic Research Analysts*, 499 F.2d 996, 1002 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

deterring fraud, the *Western Paving* decision rewards the conspirators for successfully concealing their wrongdoing.

The public policy implications of the *Western Paving* decision are staggering. In the face of increased public concern over rising taxes; huge government deficits; and fraud, waste, bribery and collusion affecting all levels of government, this Court should not allow a decision to stand which places government purchasers under the generally impossible burden of proving that a bidrigger undertook affirmative acts, beyond the submission of complementary bids and false noncollusion affidavits, to cover up a conspirary which by its very nature is already concealed.

II. *WESTERN PAVING* IRRECONCILABLY CONFLICTS WITH UNITED STATES SUPREME COURT AND CIRCUIT COURT PRECEDENT, FRUSTRATING A KEY PURPOSE OF STATUTES OF LIMITATION AND THE DOCTRINE OF FRAUDULENT CONCEALMENT.

The doctrine of fraudulent concealment is an offspring of the doctrine of undiscovered fraud. The doctrine of undiscovered fraud provides "that when the object of a suit is to obtain relief against a fraud, the bar of the statute [of limitations] does not commence to run until the fraud is discovered or becomes known to the party injured by it." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347 (1874).

The doctrine of fraudulent concealment, a well-recognized, long-standing, equitable exception to statutes of limitation, is read into every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743 (1946). In order

to invoke the doctrine and toll limitations, an antitrust plaintiff must plead and prove the following elements:

> (1) defendant concealed the conduct which forms the basis of the cause of action;
>
> (2) because of defendant's concealment, the plaintiff failed to discover its cause of action within the limitations period; and,
>
> (3) plaintiff was duly diligent in attempting to discover the facts which form the basis of its cause of action.

New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988) *petition for cert. filed,* No. 88-21 (U.S. July 2, 1988); *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 55 (lst Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-250 (9th Cir. 1978); *Charlotte Telecasters. Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976).

A. This Court Should Resolve The Lower Courts' Conflicting Applications Of The Doctrine Of Fraudulent Concealment.

At the appellate and district court levels, case law on the doctrine of fraudulent concealment in antitrust cases is inconsistent, confusing, and vague. Federal courts have applied three conflicting standards to satisfy the concealment element of the fraudulent concealment doctrine: (1) the self-

concealing conspiracy standard;[9] (2) the affirmative acts standard;[10] and (3) the affirmative acts, separate and apart, standard.[11] Further confusion results because rarely, if ever, will a self-concealing antitrust conspiracy fail to involve affirmative acts. The critical distinction under case law, therefore, lies in whether the acts of concealment are separate and apart from the underlying cause of action.

Western Paving held that a plaintiff attempting to invoke the doctrine of fraudulent concealment must prove that the defendant took affirmative steps, separate and apart from the underlying conspiracy, to meet the concealment element of the doctrine. 630 F. Supp. at 210. In so holding, the district court in *Western Paving* misconstrued *King & King Enterprises*

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[9]*E.g., New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) *petition for cert. filed*, No. 88-21 (U.S. July 2, 1988); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. 271, 274-275 (E.D. Pa. 1986); *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984).

[10]*E.g., Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988); *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1302 (9th Cir.), *cert. denied*, ___U.S. ___, 107 S. Ct. 279 (1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (lst Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 461 (2d Cir. 1974); *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964); *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cas. (CCH) para. 62,894 (E.D. Wash. 1979).

[11]*E.g., Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 888 (M.D. Pa. 1985); *Texas v. Allan Construction Co.*, No. A-85-CA-637 (W.D. Tex. 1987) (unpublished) *appeal pending*, No. 87-1766 (5th Cir.).

v. Champlin Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981), controlling legal precedent.[12] Further, *Western Paving* clearly conflicts with substantial case law from numerous jurisdictions, including a recent decision from the Second Circuit Court of Appeals:

> [A] plaintiff may prove the concealment element *by showing either* that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing.

New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988), *petition for cert. filed,* No. 88-21 (U.S. July 2, 1988) (emphasis added).

With three incompatible standards being applied, conflicts exist in abundance.[13] Colorado's Petition for Certiorari should be granted.

B. *Western Paving* Cannot Be Reconciled With *Bailey v. Glover* And Other Supreme Court Precedent Because Bidrigging Conspiracies Are Inherently Self-Concealing And Equivalent To Fraud.

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[12]*Western Paving* did not overrule or in any way modify the holding in *King*, because the *Western Paving en banc* decision, which affirmed the district court by an equally divided court, has no precedential value. *Loeffler v. Tisch*, 806 F.2d 817, 818 (8th Cir. 1986), *rev'd on other grounds*, ___ U.S. ___, 108 S.Ct. 1965 (1988) (award of prejudgment interest in civil suit against United States Postal Service) ; *Nagy v. United States Postal Service*, 773 F.2d 1190, 1192-93 n.2 (llth Cir. 1985).

[13]Such conflicts are discussed in detail in the Petition for Certiorari filed herein by the State of Colorado.

The *Western Paving* district court held that the first element of the fraudulent concealment doctrine can be satisfied only by proving that the defendant took "affirmative steps in addition to the original wrongdoing to prevent the plaintiff from discovering the wrong." 630 F. Supp. at 210.[14] *Western Paving* directly conflicts with *Bailey v. Glover* and cannot be reconciled with either its holding or rationale.

The issue before the Court in *Bailey* was whether in actions at law, plaintiff's ignorance of defendant's fraudulent conduct had to result from the defendant's affirmative acts of concealment. 88 U.S. at 347-348. The *Bailey* court held that a plaintiff need not prove affirmative acts of concealment where the cause of action "is of such character as to conceal itself." *Id.* at 349-350. The holding in *Bailey* was based upon legal precedent and a "sound and philosophical view of the principles of the statutes of limitations."

> [Statutes of limitation] were enacted to prevent frauds. . . . To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349.

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[14]The court did not discuss the second element, plaintiff's lack of knowledge, or the third element, due diligence, because it found that the plaintiff failed to prove affirmative acts, separate and apart from the conspiracy itself. 630 F. Supp. at 211 n.5.

A line of cases following *Bailey v. Glover* affirmed the holding that in actions based upon fraud it is not necessary to show affirmative acts of concealment, because fraud, by its very nature, is self-concealing. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed 743 (1946); *Exploration Co. v. United States*, 247 U.S. 435, 38 S. Ct. 571, 62 L. Ed. 1200 (1918). "[C]oncealment is established by the nature of the act. . . ." *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). On the other hand, the fraudulent concealment doctrine will toll the limitations period when fraud does not serve as the basis of plaintiff's cause of action only if the defendant has taken affirmative acts for the sole purpose of covering up the actionable wrong. Dawson, *Fraudulent Concealment and Statutes of Limitations*, 31 Mich. L. Rev. 875, 880-882 (1933) (footnote omitted) (*cited with approval in Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1469 (6th Cir. 1988)).[15] The distinction is drawn because concealment is not inherent in causes of action other than fraud. In other words, before a court may apply the doctrine of fraudulent concealment, it must find fraud; if the fraud cannot be found in the original wrong committed by a defendant, it must be found in a cover up of the wrongdoing, i.e., an affirmative act of concealment, before the statute of limitations will be tolled.

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[15]*Pinney Dock & Transport Co. v. Penn Central Corp.*, a recent decision from the Sixth Circuit, illustrates this distinction. There the Sixth Circuit held that in antitrust cases *not* founded on fraud, the plaintiff must show an affirmative act in order to invoke the doctrine of fraudulent concealment; the court did not, however, state that the acts must be separate and apart from the wrongdoing itself. 838 F.2d at 1465. Furthermore, the Sixth Circuit recognized by implication that the statute may be tolled without the necessity of proving affirmative acts of concealment when the wrong itself is fraudulent and, thus, self-concealing. *Id.*

In failing to follow this Court's holding in *Bailey*, the Colorado district court in *Western Paving* ignores the fraudulent nature of bidrigging and, as a result, draws an untenable distinction between antitrust fraud cases and other types of fraud cases. There is, however, no rational basis for drawing such a distinction. Fraud is fraud, and the same rationale that this Court has relied upon over the years in applying the equitable doctrine of undiscovered fraud applies with equal force to the self-concealing conspiracy of bidrigging.

By its very nature, the *per se* violation of bidrigging (especially when the bidrigging involves complementary bidding) virtually always involves secret agreements and covert meetings; the success of the conspiracy depends upon such concealment. As the Second Circuit recently stated in *New York v. Hendrickson Bros.*:

> The passing off of a sham article as one that is genuine is an inherently self-concealing fraud, whether what is passed off is a fake vase sold as a real antique, or a collusive bid purporting to reflect genuine competition. . . . [A] bid-rigging conspiracy is the kind of enterprise that requires a number of participants and, in order that there be adequate incentive for their participation, agreement as to a number of contracts. Thus, the enterprise is designed to endure over a period of time. In order to endure, it must remain concealed from the victim of the collusive bids.

840 F.2d. at 1083-1084 (citations omitted). Need for concealment is further heightened because of the criminal sanctions and civil liabilities which might result if such actions are discovered. Thus, bidrigging

conspiracies have been recognized as self-concealing and fraudulent. *New York v. Hendrickson Bros.*, 840 F.2d at 1083-84; see also *Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1314 (5th Cir. 1983); *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422, 429 (N.D. Ohio 1984).

Although there are undoubtedly occasions when antitrust laws may be violated without fraudulent conduct, "there may also be circumstances where fraud is an ingredient of the anticompetitive scheme." *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979). The Seventh Circuit further stated in *Azzarelli* that when defendants collude to defeat a competitive bidding statute "prescribed in the public interest. . .in order to obtain for taxpayers the lowest possible costs for public works being undertaken" their conduct "plainly manifest[s] a species of fraud or false representation." *Id.* The *Azzarelli* court noted that "this is particularly true where, as here, bidders were required by law to sign (and did sign) statements that no collusion had been practiced." *Id.* Under such circumstances, the plaintiff's conduct is fraudulent. *Id. See also, United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988); *United States v. Walker*, 653 F.2d 1343, 1346-47 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

The wrongdoing in the *Western Paving* case was, as in *Bailey*, *Azzarelli* and *Henrickson Bros.*, clearly self-concealing and fraudulent. No further concealment need be shown for tolling purposes.

CONCLUSION AND PRAYER

For the foregoing reasons, the State of Colorado's Petition for Certiorari should be granted.

Respectfully submitted,

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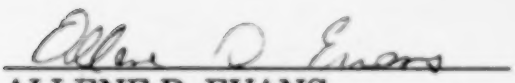

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No. 87-2027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodard,
Petitioner,

v.

WESTERN PAVING CONSTRUCTION CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether proof of some affirmative act of concealment must be produced in order to toll the federal antitrust statute of limitations, 15 U.S.C. § 15b, under the equitable doctrine of fraudulent concealment.

RULE 28.1 STATEMENT

Respondent, Western Paving Construction Company ("Western Paving"), is an indirect wholly-owned subsidiary of Redland, PLC, a company based in Great Britain.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2027

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodard,
Petitioner,

v.

WESTERN PAVING CONSTRUCTION CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals sitting *en banc* (Pet. App. 1-2) is reported at 841 F.2d 1025. The vacated panel opinion of the court of appeals (Pet. App. 5-42) is reported at 833 F.2d 867. The opinion of the district court (Pet. App. 43-55) is reported at 630 F. Supp. 206.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1988 (Pet. App. 1-2). The petition for a writ of certiorari was filed on June 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4B of the Clayton Antitrust Act, 15 U.S.C. § 15b, as amended (1982), provides:

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

STATEMENT OF THE CASE

1. Petitioner, the State of Colorado, filed a complaint against respondent, Western Paving, on July 19, 1984, alleging that respondent had participated in a conspiracy to rig bids on a 1971 Colorado highway construction project, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982) (Pet App. 5-6).[1] Petitioner did not, however, allege that any act of conspiracy occurred within the four-year limitations period established by Section 4B of the Clayton Act, 15 U.S.C. § 15b (*id.* at 6). Rather, petitioner alleged that respondent had fraudulently concealed the alleged violations and had thereby tolled the statutory limitations period (*ibid.*). The parties then conducted nearly two years of extensive discovery with respect to these issues (*ibid.*).

As to petitioner's allegation that respondent had engaged in bid-rigging in connection with the 1971 Newcastle Easterly project, discovery revealed only that one

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[1] Petitioner originally alleged that respondent had been involved in a conspiracy relating to two highway projects let in 1971 and 1978. But petitioner failed to substantiate, and subsequently withdrew, its allegations relating to the 1978 project. After respondent moved for summary judgment, petitioner alleged that respondent engaged in bid-rigging in connection with two other projects let in 1973 and 1974. The district court found, however, that "[t]he only conspiracy for which the State has presented factual support against Western Paving is the 1971 Newcastle Easterly job" (Pet. App. 52 n.4).

of the alleged co-conspirators, Larry Corn, an employee of one of respondent's competitors, Corn Construction Company, claimed to have had a single two-minute telephone conversation in 1971 with an officer of respondent, Harold Stillman (Pet. App. 9-10).[2] Corn claimed that he spoke with Stillman to determine if respondent would "go along" with Corn's scheme to win the 1971 Newcastle project (*id.* at 10). Corn could not remember the details of the alleged conversation, and acknowledged that respondent had never received a complementary bid from Corn Construction and that Corn had had no subsequent contacts with respondent (*id.* at 8-10).

Regarding petitioner's allegation of fraudulent concealment by respondent, discovery revealed that respondent had submitted a bid on the 1971 project that had the appearance of regularity, that Stillman failed to disclose the alleged bid-rigging telephone call to anyone before he died in June 1971, and that, during a 1982 interview with the Colorado Department of Highways, which occurred nearly seven years after the statute of limitations had already run on the 1971 project, one of respondent's officials denied any wrongdoing on respondent's part (Pet. App. 49-51). In addition, discovery revealed that Corn, but not respondent, had submitted a noncollusion affidavit on the Newcastle project, placed telephone calls to competitors from a motel where he was staying in Denver, and discarded a list of names of competitors allegedly involved in the conspiracy (Pet. App. 49-51).

2. At the close of discovery, respondent filed motions to dismiss and for summary judgment (Pet. App. 6). Petitioner, in turn, filed its own motion for partial summary judgment on the fraudulent concealment issue

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[2] Corn admitted that he had participated in at least 13 bid-rigging schemes and that he had settled the actions against him and his employer by paying damages and agreeing to cooperate with petitioner in the investigation and prosecution of other alleged bid-riggers (Pet. App. 10).

(*ibid.*). The district court (Arraj, J.) then granted respondent's motion for summary judgment (Pet. App. 43-56).

The district court began by noting that "[t]he courts have applied the equitable tolling doctrine differently, depending upon the circumstances and underlying facts of each case" (Pet. App. 46). "To invoke the equitable tolling doctrine in the antitrust context," the court found, courts have required "a plaintiff [to] plead and prove three elements: (1) affirmative acts of concealment by the defendant; (2) successful concealment from the plaintiff; *and* (3) plaintiff's due diligence until discovery of the facts" (*id.* at 46-47) (emphasis in original; citations omitted). By contrast, the court noted, "[f]raud cases are treated differently because the original fraud is itself an act of concealment and is considered to be inherently more difficult for a plaintiff to discover" (*id.* at 47).

The court then rejected petitioner's argument that proof of affirmative acts of concealment by respondent was not necessary in order to toll the antitrust statute of limitations (Pet. App. 48-49). The court noted that "[t]he cases cited by plaintiff in support of this argument involve underlying actions for fraud," and it found that "these cases are inapposite to the instant antitrust action" (*id.* at 48). The court added that petitioner "relies on a misconstrued reading of *King & King Enterprises v. Champlin Petroleum Co.*," 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), pointing out that "[t]he Court's decision to toll the statute was specifically based on a finding that 'the defendant actively sought to conceal its price fixing activities,'" and that the Tenth Circuit's holding in *King & King Enterprises* was that fraudulent concealment can be established in an antitrust case only by "proof of affirmative acts of concealment" (Pet. App. 48-49 & n.3, citing 657 F.2d at 1156, 1154-55).

The court next found that petitioner had not adduced sufficient facts relating to affirmative acts of concealment (Pet. App. 49-52). It concluded that petitioner "has failed to establish that [Corn's submission of a noncollusion affidavit] should be imputed to Western Paving," and that, in any event, "the submission of an allegedly false noncollusion affidavit is, at most, a failure to disclose or [a] denial of wrongdoing," neither of which amounts to "an affirmative act of concealment" (*id.* at 50). The court reached a similar conclusion with respect to both respondent's express denial of wrongdoing and Stillman's failure to disclose his alleged conversations with Corn prior to his death (*id.* at 50-51). Finally, the court held that neither the submission of a regular-appearing, complementary bid by respondent nor Corn's discarding of a list of competitors and telephone numbers were affrmative acts of fraudulent concealment (*id.* at 51). Noting that the facts forming the basis for petitioner's claim occurred more than 13 years prior to the filing of the complaint, the court concluded that "[t]his is a classic case in which the statute of limitations should be given effect" (*id.* at 52).

3. On appeal, a panel of the Tenth Circuit reversed and remanded (Pet. App. 5-42). The panel agreed with the district court that petitioner had failed to establish any affirmative acts of fraudulent concealment sufficient to toll the statute of limitations (*id.* at 26-28). It then held that proof of affirmative acts of concealment is not necessary where a conspiracy is "self-concealing" and rejected what it deemed to be the district court's contrary holding on this point (*id.* at 28-31). But the panel also held that, in order to alleviate the problems created by stale evidence, clear and convincing proof of the self-concealing conspiracy is necessary if the limitations period is to be tolled (*id.* at 32-38). The panel remanded for a trial on the basis of this evidentiary standard (*ibid.*).

4. In response to cross-motions for rehearing *en banc*, the Tenth Circuit ordered additional briefing and oral argument by the parties (Pet. App. 2-4). The full court then vacated the panel decision and affirmed the district court's decision by an equally divided court (*id.* at 2).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.[3]

1. This Court has long held that the plaintiff who invokes the doctrine of fraudulent concealment will be "held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'" *Wood v. Carpenter*, 101 U.S. 135, 139-140 (1879) (citation omitted). Under this view, where the plaintiff's substantive claim includes purposeful deception as one of its essential legal elements (*e.g.*, fraud), the Court has held that the concealment element is sufficiently pleaded and that only due diligence must additionally be proved in order to toll the statute of limitations. *Accord, Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874); *Exploration Co. v. United States*, 247 U.S. 435, 445 (1918); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). But where the plaintiff's substantive claim does not include purpose-

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[3] Just before filing this brief, respondent, on July 21, 1988, received the amici curiae brief filed on behalf of various state attorneys general. Since that brief does not contain any new arguments or authorities, but simply repeats the arguments made by petitioner, a separate response is not warranted. Accordingly, respondent's argument section of this brief answers both the petition and the amici curiae brief. It should be noted that these same arguments of the amici were also made before the *en banc* Tenth Circuit in an amicus curiae brief filed by the Attorney General of Florida.

ful deception as one of its essential legal elements, the Court has held that affirmative acts of concealment must be pleaded and proved in order to invoke the fraudulent concealment doctrine. *See Wood v. Carpenter*, 101 U.S. at 143. *Accord, Hennegan v. Pacifico Creative Services, Inc.*, 787 F.2d 1299 (9th Cir. 1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984) *cert. denied*, 470 U.S. 1056 (1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964).

The decision below follows straightforwardly from these long-accepted principles. An equally divided court of appeals affirmed the judgment of the district court, which recognized that "[t]he courts have applied the equitable tolling doctrine differently, depending upon the circumstances and underlying facts of each case" (Pet. App. 46). The district court noted that, in fraud cases, the courts have only required proof of plaintiff's diligence because "the original fraud is itself an act of concealment and is . . . inherently more difficult for a plaintiff to discover" (*id.* at 47). By contrast, it found that, because concealment is not an essential legal element of an antitrust conspiracy claim, before the statute may be tolled in an antitrust conspiracy case, "[t]he concealment element requires proof that the defendant engaged in *affirmative* conduct designed to lead a reasonable person to believe that he did not have a claim for relief" (*ibid.*) (citations omitted; emphasis in original). These principles are, of course, the same principles that this Court has applied with respect to the equitable tolling doctrine generally.

Petitioner errs in suggesting (Pet. 11-18) that, by applying these established principles, the decision below relegates the antitrust laws to a position inferior to that of the laws pertaining to fraud. On the contrary, the decision below simply recognizes that, in contrast to a

fraud claim, an antitrust claim—in particular, a bid-rigging conspiracy claim—does not require proof of concealment. An antitrust claim requires proof of an agreement unreasonably to restrain trade; and the agreement need not be kept secret in order to be a violation of the law. *See, e.g., NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98-113 (1984); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 686-696 (1978). Thus, the decision below does not relegate the antitrust laws to an inferior position; it simply recognizes the different elements involved in antitrust and fraud claims.

2. Petitioner and amici further err in suggesting (Pet. 18-26; Amici Br. 7-10) that the federal courts are divided on the issue of fraudulent concealment in antitrust cases. Contrary to their contention and consistent with the conclusions of the district court below, every court of appeals that has addressed the issue of fraudulent concealment in an antitrust conspiracy case, where concealment is not one of the elements of the cause of action, has relied on proof of affirmative acts of concealment to toll the statute of limitations. *See, e.g., Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988), *cert. pending on other grounds* No. 88-72 (filed June 11, 1988) (plaintiff "required to prove affirmative acts of concealment"); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 (4th Cir. 1987) (defendant's denials of conspiracy inadequate for tolling purposes; need affirmative conduct "directed at deflecting litigation"); *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1229, 1302 (9th Cir.) *cert. denied*, 107 S.Ct. 279 (1986) (time-barred complaint dismissed for failure to allege "affirmative conduct that fraudulently concealed the existence of a cause of action"); *Berkson v. Del Monte Corp.* 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985) (plaintiff's complaint dismissed

due to failure to allege "affirmative conduct" by defendant to conceal antitrust claim); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (plaintiff's burden to show that "some affirmative act of fraudulent concealment frustrated discovery notwithstanding [due] diligence"); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) (fraudulent concealment doctrine requires showing that "defendants concealed the conduct complained of . . . ."); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) (time-barred complaint dismissed for failure to allege particular act of concealment); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962) (fraudulent concealment doctrine applies to antitrust cases where defendants, "through affirmative action", fraudulently concealed conspiracy).

Contrary to the contention of petitioner and amici, the holding below is not in conflict with the Second Circuit's recent decision in *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988), *cert. pending*, Nos. 88-21/43 (filed July 2 and 6, 1988).[4] Consistent with every other court of appeals that has addressed the issue, the Second Circuit in *Hendrickson* relied on a showing of affirmative acts of concealment to reach its conclusion that the statute of limitations had been equitably tolled. *New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1085.[5]

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[4] The defendants in *Hendrickson* filed petitions for certiorari on an issue different than that presented by the petitioner herein, namely, whether the affirmative acts of concealment found in that case are attributable to co-conspirators for tolling purposes. *See* footnote 5, *infra*. The defendants in *Hendrickson* also contend that the self-concealing conspiracy theory is not an alternative basis for tolling the statute of limitations as to an alleged co-conspirator.

[5] The affirmative acts found sufficient to toll the statute of limitations in *Hendrickson* included the burning and shredding of "tell-

Moreover, in formulating its dictum regarding a self-concealing conspiracy, the court in *Hendrickson* relied exclusively on the subsequently-vacated panel opinion in this case even though substantial authority from the Second Circuit continues to support the affirmative acts requirement. *Cerbone v. Intern. Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d at 460. Accordingly, petitioner's reliance on the references in *Hendrickson* to a self-concealing conspiracy is misplaced and does not undermine the consistency with which courts of appeals have applied the fraudulent concealment doctrine in antitrust cases.

Petitioner and amici also err in referring to *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, as a case which recognizes the self-concealing conspiracy standard and thereby conflicts with the decisions of other federal courts (Pet. 20; Amici Br. 9, n.9). On the contrary, as explained by the district court below, *King & King Enterprises* specifically confirms and applies the affirmative acts requirement (Pet. App. 49, n.3). In all events, the controlling precedent in the Tenth Circuit is not *King & King Enterprises* but the *en banc* affirmance of the district court's opinion in this case. Similarly misplaced are references by petitioner and amici to the district court opinions in *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984), and *Bethlehem Steel Corp. v. Fishbach & Moore, Inc.*, 641 F. Supp. 271 (E.D. Pa. 1986). *F. Buddie* has been superceded by the Sixth Circuit decision in *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, specifically rejecting the self-concealing theory and requiring a showing of affirmative acts of concealment. And since the lower court opinion in *Fishbach* relied solely on the now-discredited opinion in *F. Buddie*, it too

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tale documents" and an agreement to give false testimony before a grand jury. *New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1084.

has no precedent value. Accordingly, the cases relied on by petitioner and amici do not demonstrate any conflict in the lower federal courts on the issue of fraudulent concealment in antitrust cases.[6]

Of course, as a practical matter, persons conspiring to restrain trade generally attempt to conceal their agreements and activities in order to promote the success of their efforts. As a consequence, plaintiffs in antitrust conspiracy cases often, though not always, can produce proof of affirmative acts of concealment as well as the basic elements of their conspiracy claims. *See, e.g., New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1084-1085; *Pinney Dock and Transport Co. v. Penn. Central Corp.*, 838 F.2d at 1472-1477; *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 284. These decisions, as well as those relied on by petitioner and amici, are nonetheless consistent with the prevailing judicial view that proof of affirmative acts of concealment is necessary to toll the antitrust limitations period.

3. For much the same reasons, the claim of petitioner and amici (Pet. 26-29; Amici Br. 10-14) that the decision below is inconsistent with this Court's precedents is unfounded. As noted above, this Court has held that proof of plaintiff's diligence is all that is necessary to toll the limitations period in fraud cases where concealment is an element in the underlying cause of action; but in cases where the underlying cause of action does not require proof of concealment, proof of separate affirma-

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[6] Petitioner also cites two non-antitrust cases that merely state the rule that self-concealing conduct is sufficient to toll a statute of limitations in cases of fraud or in cases where concealment is a necessary element of the cause of action. *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emerg. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978); *Baker v. F&F Investment*, 420 F.2d 1191, 1198-99 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970). These cases do not conflict with the requirement that only proof of affirmative acts of concealment can toll the limitations period in antitrust cases.

tive acts of concealment is necessary for tolling purposes. Moreover, the Court has made it clear that proof of silence or passivity on the defendant's part is not sufficient; "[t]here must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Wood v. Carpenter*, 101 U.S. at 143. Finally, there is no basis for suggesting that requiring proof of affirmative acts of concealment in cases of alleged *per se* antitrust violations will read the fraudulent concealment exception out of the statute of limitations. As the cases cited above illustrate, in both *per se* and Rule of Reason cases, plaintiffs can often prove that affirmative acts of concealment were undertaken by defendants. Indeed, eliminating the requirement of proof of affirmative acts of concealment would read the limitations period out of the statute; a plaintiff would be entitled to have the statute of limitations tolled in every case where there is an alleged *per se* antitrust violation. *See Hall v. E.I. DuPont de Nemours & Co.*, 312 F.Supp. 358, 362 (E.D.N.Y. 1970). The fact that Congress did not provide for such a broad exception to the four-year limitations period set forth in Section 4B of the Clayton Act is persuasive evidence that it did not intend that there should be one.[7]

4. In the final analysis, petitioner and amici are masking their objections to the factual findings of the district court, affirmed by the court of appeals, with misleading arguments about the well-settled law of this Court and

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[7] In enacting Section 4B of the Clayton Act, Congress considered longer limitations periods but decided in favor of a "uniform statute of limitations applicable to *all* private treble damage actions—and Government damage actions as well—of 4 years." H.R. Rep. No. 422, 84th Cong., 1st Sess., 7 (1955) (emphasis added). It selected the shorter period as "fair and equitable", observing that "a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts." *Id.* at 7-8. Significantly, the House Report specifically uses a conspiracy case to illustrate the need for a uniform four-year statute of limitations. *Id.* at 6.

the courts of appeal. Petitioner and amici object to the findings that none of the alleged acts—namely, the submission of a bid that had the appearance of regularity, Stillman's failure to disclose his alleged 1971 conversation with Corn, respondent's denials of wrongdoing, and the actions of Corn—constitutes an act of fraudulent concealment sufficient to toll the statute of limitations as to respondent (*see* Pet. 21-22, 27-29; Amici Br. 5-7, 13-14). Such factual findings, affirmed by the court of appeals below, are, of course, not worthy of review by this Court. *See Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2623 (1987). In any event, these findings are correct and have produced a manifestly sensible result. As the district court in this case concluded:

> This is a classic case in which the statute of limitations should be given effect. The facts forming the basis for plaintiff's claim occurred over 13 years prior to the filing of the complaint. The State's case is based almost entirely on the testimony of one witness, Larry Corn. His testimony cannot be corroborated because the only Western Paving employee with whom he 'conspired,' Harold Stillman, is now deceased. Both parties admit that many, if not all, of the relevant documents, including the noncollusion affidavits, bid proposals and other documents relating to the bidding process, have been destroyed pursuant to normal record retention policies.

(Pet. App. 52, footnote omitted). The district court's practical and just resolution of this case was affirmed by the Tenth Circuit *en banc* and does not warrant review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATE OF COLORADO ex rel. Colorado
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

Pursuant to S. Ct. R. 22.6, respondent, Western Paving Construction Company, submits this brief response to petitioner's supplemental filing of September 21, 1988 on the basis of the Fifth Circuit's recent decision in *Texas v. Allan Construction Co.*, 1988-2 Trade Cas. (CCH) ¶ 68,183, 1988 U.S. App. LEXIS 11244 (5th Cir. 1988).

1. Contrary to petitioner's arguments, the *Allan* opinion fully supports and confirms the correctness of the Tenth Circuit's decision affirming the district court's judgment in this case. Consistent with the decisions of the district court and court of appeals below, the court in *Allan* confirmed the prevailing judicial view that proof

of affirmative acts of concealment is necessary to toll the antitrust statute of limitations under the fraudulent concealment tolling doctrine. *See* Pet. App. at 4919.[1] As this prevailing view was the basis for the decisions below, the *Allan* opinion further demonstrates that additional review of this case is not warranted.

2. Petitioner further errs in contending that the *Allan* opinion conflicts with the Second Circuit's decision in *New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2d Cir. 1988), *petitions for cert. filed*, 57 U.S.L.W. 3061 and 3062 (U.S. July 2 and 8, 1988) (Nos. 88-21 and 43). Consistent with the *Allan* opinion and every other federal court of appeals that has addressed the issue, the court in *Hendrickson* relied on a showing of affirmative acts of concealment to reach its conclusion that the antitrust limitations period had been equitably tolled. *New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1085. Accordingly, the disagreement expressed by the court in *Allan* with the dictum in *Hendrickson* regarding the self-concealing conspiracy theory does not undermine the consistency with which federal courts of appeals have applied the fraudulent concealment doctrine in antitrust cases.[2]

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[1] See also, *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988), *cert. pending on other grounds* (No. 88-72) (filed June 11, 1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 (4th Cir. 1987); *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1229, 1302 (9th Cir.), *cert. denied*, 107 S.Ct. 279 (1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962).

[2] It is also important to note that the court in *Hendrickson* relied exclusively on the Tenth Circuit's subsequently-vacated panel opin-

3. Petitioner also errs in suggesting that the result in *Allan* somehow demonstrates the "egregiousness" of the result in the case. (Pet. Sup. Br. 10). Contrary to this mischaracterization and for the reasons identified by the district court below, this "is a classic case in which the statute of limitations should be given effect." (Pet. App. 52). Moreover, in objecting to the result in this case on the basis of the result in *Allan*, petitioner is attempting to convert the district court's factual findings that none of the alleged acts were affirmative acts of concealment into legal arguments, none of which were raised in the petition for certiorari presently before this Court. Such factual findings, however characterized, are not worthy of this Court's review.

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ion in this case in formulating its dictum regarding the self-concealing conspiracy theory. The uncertainty over how the court in *Hendrickson* would have treated the self-concealing conspiracy theory in light of the Tenth Circuit's *en banc* vacating of the panel opinion further weakens the operative significance of the *Hendrickson* opinion in this appeal.

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87-2027

In The

Supreme Court of the United States

October Term, 1987

STATE OF COLORADO, ex rel. Colorado Attorney General Duane Woodard,

Petitioner,

vs.

WESTERN PAVING CONSTRUCTION CO.,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER STATE OF COLORADO IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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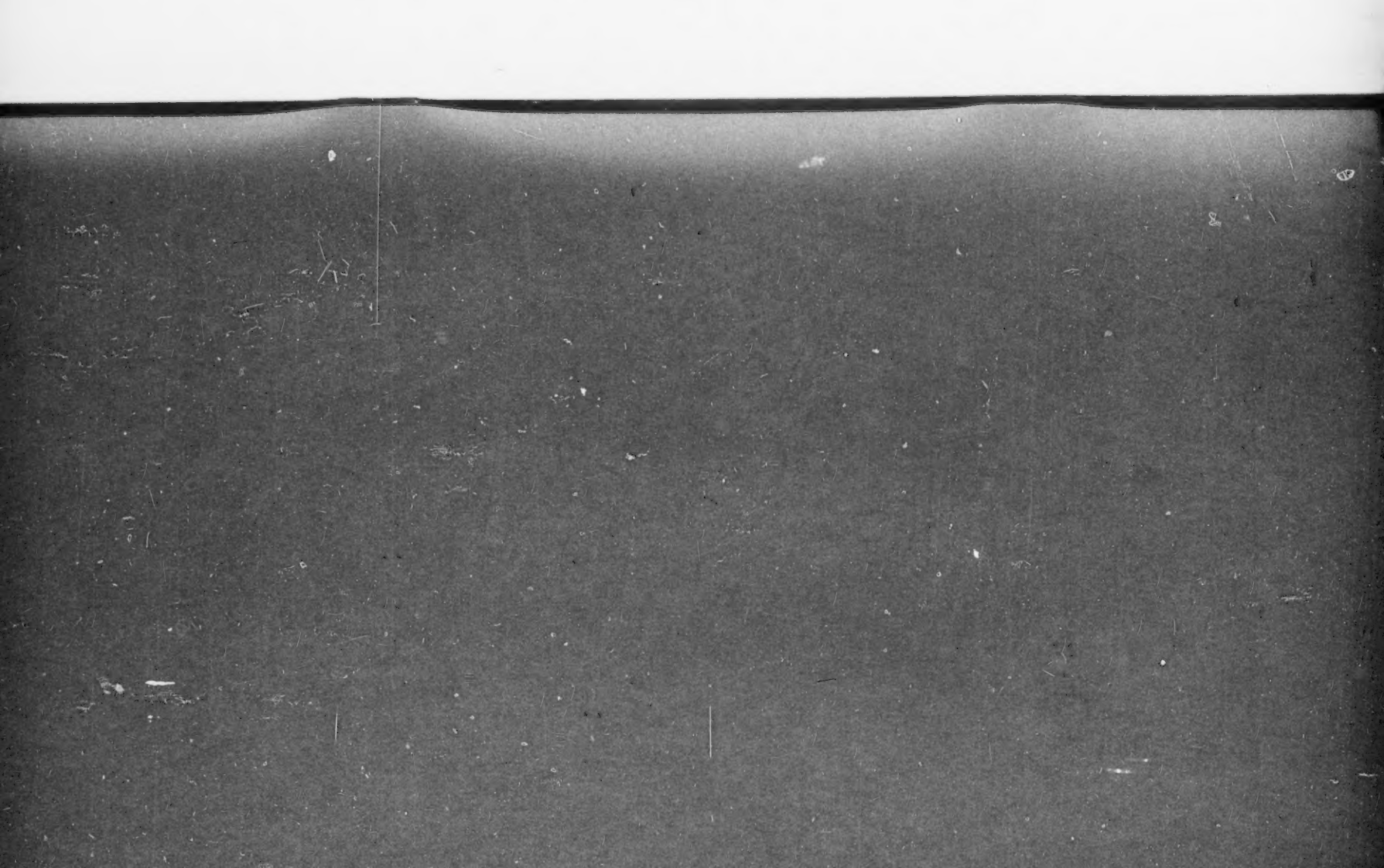

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RULE

S. Ct. R. 22.6 1

Pursuant to S. Ct. R. 22.6, the State of Colorado submits this supplemental brief in support of its June 8, 1988 petition for issuance of a writ of *certiorari* in the instant case. The basis for this supplemental filing is the subsequent decision in *Texas v. Allan Construction Co.*, 851 F. 2d 1526 (5th Cir. 1988). *See* App. That opinion is the most recent of five federal appellate rulings in less than a year, including two in the case at hand,[1] on the same question—the equitable tolling of the federal antitrust statute of limitations pursuant to the doctrine of fraudulent concealment.[2]

The *Allan* opinion heightens the necessity for the Supreme Court to grant *certiorari* in the instant action, in order to:

1. Clarify an increasingly important area of federal law which has not previously been addressed by the Court in an antitrust context.

2. Resolve the growing split among the lower federal courts, which has been accentuated by the *Allan* decision.

3. Rectify the erroneous result in the case at hand, the egregiousness of which is underscored by the result in *Allan*.

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[1] *See Colorado ex rel. Woodard v. Western Paving Constr. Co.*, 833 F. 2d 867 (10th Cir. 1987), *panel opinion vacated and district court decision aff'd by an equally divided court (per curiam)*, 841 F. 2d 1025 (10th Cir. 1988) (*en banc*).

[2] Four of the five recent circuit court fraudulent concealment rulings have come in the same context—highway bidrigging cases (*i.e.*, treble damage actions by state attorneys general against contractors, alleging bidrigging on highway construction projects). In addition to the Fifth Circuit's *Allan* decision and the panel and *en banc* rulings by the Tenth Circuit in the instant case, *see supra* n. 1, the Second Circuit has also issued such a decision. *See New York v. Hendrickson Bros.*, 840 F. 2d 1065 (2nd Cir.), *petitions for cert. filed*, 57 U.S.L.W. 3061 & 3062 (U.S. July 2 & 8, 1988) (Nos. 88-21 & 43). (The fifth recent appellate court ruling on the fraudulent concealment doctrine in an (cont'd)

BACKGROUND

On November 5, 1985, the State of Texas filed a federal antitrust suit against Allan Construction Co. and its president, alleging their participation in a conspiracy to rig bids on state highway construction projects. App. 4. Apparently, there was no evidence that any acts done pursuant to the conspiracy occurred within the four year federal antitrust statute of limitations.[3] *See* Clayton Act Section 4B, 15 U.S.C. sec. 15b, as amended (1982). Consequently, the parties agreed that unless the doctrine of fraudulent concealment equitably tolled the running of the limitations period until at least November 5, 1981, Texas' suit was time barred. App. 5.

The district court flatly rejected Texas' contention in the foregoing regard. In pertinent part, the trial court ruled that Texas could not establish any affirmative concealment to toll the statute. In the court's view, the only evidence of concealment consisted of acts undertaken at the time of and in furtherance of the offense; such acts did not legally constitute "affirmative acts of concealment." Accordingly, the court granted summary judgment for defendants. *See* App. 2, 4-5, 13.

The acts proffered by Texas in *Allan* included the filing of false non-collusion affidavits, protection of the secrecy of bidrigging discussions and submission of complementary bids. App. 6, 13. Such acts are among those involved in the instant case. *See Colorado ex rel. Woodard*

(cont'd) antitrust context was rendered by the Sixth Circuit in a monopoly-type case. *See Pinney Dock & Transp. Co. v. Penn Central Corp.*, 838 F. 2d 1445 (6th Cir.), *petition for cert. filed* (on other grounds) *sub nom. Pinney Dock & Transp. Co. v. Norfolk & W. Ry.*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 88-72).)

[3] The last project included in the alleged conspiracy was let on February 13, 1980, more than five and one-half years before suit was filed. *See* App. 5.

v. Western Paving Construction Co., 630 F. Supp. 206, 209-10 (D. Colo. 1986), *rev'd*, 833 F. 2d 867, 876 (10th Cir. 1987), *panel opinion vacated and district court decision aff'd by an equally divided court (per curiam)*, 841 F.2d 1025 (10th Cir. 1988) *(en banc)*.

On appeal, the Fifth Circuit reversed the district court. Initially, the appellate court rejected Texas' assertion that the bidrigging violation was "inherently self-concealing." App. 6-13, 20. However, the circuit court went on to hold that the affirmative acts necessary for fraudulent concealment need not be separate from the acts underlying the wrong itself. App. 13-16, 20. Accordingly, the appellate court concluded that Texas was entitled to present its evidence of concealment at trial. App. 20. Such affirmative acts of concealment analysis is contrary to that of the district court and appellate panel in this case on the same kinds of facts. *See* 630 F. Supp. at 210, *rev'd on other grounds*, 833 F. 2d at 877.

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ARGUMENT

As recognized by the appellate court in Allan, the first or "concealment" element of the equitable tolling doctrine potentially involves two concepts—inherent self-concealment and affirmative acts of concealment. App. 6. The *Allan* opinion is the most recent of several recent federal appellate decisions discussing these twin elements.[4] As the Fifth Circuit there stated, "these aspects of the fraudulent concealment doctrine have occasioned confusion in federal courts . . . ." App. 6. Unfortunately, *Allan* itself heightens, rather than alleviates, that confusion.

1. The Fifth Circuit's Decision in Allan Highlights the Need for the Supreme Court to Clarify the Fraudulent

[4] *See supra* n. 2

Concealment Doctrine in the Context of Per Se Antitrust Violations Such as Bidrigging. Citing *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), the Fifth Circuit in *Allan* acknowledged that several federal courts have held affirmative acts to be unnecessary for equitable tolling of the statute of limitations where the underlying wrong is inherently self-concealing. App. 7. However, the circuit court restricted application of such self-concealment theory to situations where the gist of the cause of action is fraud. The basis for the court's limitation in this regard was its view that concealment is inherent in fraud but, apparently, not in other offenses. *See* App. 7-8.

Having posited the foregoing dichotomy, the Fifth Circuit concluded that antitrust bidrigging violations are not inherently self-concealing. *See* App. 11. Essentially, it reasoned that bidrigging is not significantly different from other forms of price fixing.[5] Accordingly, if bidrigging were seen as being self-concealing, all other forms of price fixing would have to be viewed in the same fashion. However, Congress could not have intended for the fraudulent concealment doctrine to toll the statute of limitations in *every* price-fixing case.[6] App. 12.

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[5] In the Fifth Circuit's view, all forms of price fixing, including bidrigging, need to remain concealed in order to be successful. Similarly, the appellate court reasoned that all price-fixing conspiracies, not just bidrigging ones, are designed to extend over time in order to maximize monopoly-type profits. Finally, the court concluded that all prices charged by price fixers or bidriggers purport to be competitive to the extent that they hold themselves out as lawful. *See* App. 12.

[6] The Fifth Circuit assumed too much in implying that, if bidrigging and price fixing were inherently self-concealing, the fraudulent concealment doctrine would always be satisfied in such cases and the statute of limitations tolled. Even if every such *per se* offense were sufficient to meet the concealment prong, under the Fifth Circuit's own test the statute would still not be tolled unless the plaintiff, despite being duly dili- (cont'd)

In arriving at such conclusion, the *Allan* court's analysis muddies the jurisprudential waters by overlooking the fact that fraud is the very essence of the *per se* antitrust violations of bidrigging and price fixing. *See, e.g., United States v. Washita Construction Co.*, 789 F. 2d 809, 818 (10th Cir. 1986); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *United States v. Azzarelli Construction Co.*, 612 F. 2d 292, 298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980). The Fifth Circuit further confuses the issue by ignoring its own acknowledgement that concealment is inherent in the commission of bidrigging and price fixing. *See* App. 12 (such activity must remain concealed to be successful because public knowledge usually ends the agreement); *Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983) (such activity is normally concealed because of the applicable criminal and civil penalties).

Moreover, *Allan* asserts the existence of at least two different doctrines for tolling federal statutes of limitation —one applicable in fraud actions and another in antitrust cases. This contravenes the teaching of the Supreme Court itself that the doctrine of fraudulent concealment announced in *Bailey v. Glover* is applicable to and serves to toll *every* federal statute of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

Furthermore, the *Allan* opinion imposes on the antitrust laws a position of inferiority to laws applicable to fraud. Such juxtaposition is unwarranted in view of the

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(cont'd) gent had nonetheless failed to discover the facts forming the basis of its claim. *See* App. 5-6, 11-12 n. 20. *See also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Bailey v. Glover*, 88 U.S. (21 Wall.) at 349-50.

signal public importance of the competitive economic policies embodied in the antitrust laws. *See generally City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 & n. 16 (1978).

The preceding inherent self-concealment analysis and effects are exactly the same as those in the case at hand.

2. The Fifth Circuit's Decision in Allan Exacerbates the Split Among the Lower Federal Courts Regarding Application of the Fraudulent Concealment Doctrine. As noted above, the *Allan* court limited the inherent self-concealment approach solely to wrongs grounded in fraud and, for other types of cases, required affirmative acts of concealment in order to toll the statute of limitations. Although comporting with the operative interpretation in the instant case, *see* 630 F. Supp. at 210, such action flatly conflicts with decisions of at least two other circuit courts. *See New York v. Hendrickson Brothers*, 840 F. 2d 1065, 1084 (2nd Cir. 1988), *petitions for cert. filed*, 57 U.S.L.W. 3061 & 3062 (U.S. July 2 & 8, 1988) (Nos. 88-21 & 43); *Hobson v. Wilson*, 737 F. 2d 1, 33 & n.2 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).[7]

Indeed, the Fifth Circuit in *Allan* explicitly rejected the Second Circuit's *Hendrickson* holding that bidrigging is inherently self-concealing. App. 11. It also declined to follow the D.C. Circuit's *Hobson* application of the self-

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[7] *See also Colorado ex rel. Woodard v. Western Paving Constr. Co.*, 833 F. 2d 867, 879-80, 881 (10th Cir. 1987) (applying inherent self-concealment approach to *per se* antitrust offense of bid-rigging), *vacated and withdrawn (per curiam)*, 841 F. 2d 1025 (10th Cir. 1988) *(en banc), aff'g by an equally divided court* 630 F. Supp. 206 (D. Colo. 1986); *King & King Enter. v. Champlin Petroleum Co.*, 657 F. 2d at 1154-56 (applying inherent self-concealment theory to *per se* antitrust offense of price fixing). *See generally Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978).

concealment theory to wrongs which are not grounded in fraud but which merely contain an element of deception. App. 11-12 & n.20. This conflict among the circuits is made even more pointed by the fact that the contrary opinions in *Allan* and *Hendrickson* came in the very same context—antitrust highway bidrigging cases brought by states.

The conflict is further highlighted by the Sixth Circuit's action, akin to that of the Fifth Circuit, rejecting application of the inherent self-concealment concept outside the fraud context and requiring affirmative acts of concealment in such cases. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F. 2d 1445, 1472 (6th Cir.), *petition for cert. filed* (on other grounds) *sub nom. Pinney Dock & Transport Co. v. Norfolk & Western Railway*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 87-72.).[8] Although an antitrust case, *Pinney Dock* arose in a monopoly-type context which, unlike such *per se* offenses as bidrigging and price fixing, is not inherently fraudulent in nature.

3. The Fifth Circuit's Decision in Allan Underscores the Egregiousness of the Result in the Instant Case. Notwithstanding its rejection of the inherent self-concealment theory and the resulting contribution to the growing confusion and split among the federal courts, the *Allan* opinion indicates the erroneous nature of the result in the instant case.

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[8] Moreover, both *Allan* and *Pinney Dock* contribute to additional confusion among those courts following the "affirmative acts" formulation for the concealment prong of the equitable tolling doctrine. Those cases hold that the concealing conduct need not be separate and apart from, but may be part of, the underlying violation. *See Allan*, App. 13-14, 20; *Pinney Dock*, 838 F. 2d at 1473-77. However, another line of federal court cases holds exactly the contrary, requiring the concealing conduct to be independent of the commission of the substantive offense. *See, e.g., Western Paving*, 833 F. 2d at 877, *rev'g on other grounds* 630 F. Supp. at 210; *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 888 (M.D. Pa. 1985).

In *Allan*, Texas contended that acts done in furtherance of the bidrigging—such as filing false non-collusion affidavits, protecting the secrecy of bidrigging discussions and submitting complementary bids—could also constitute affirmative acts of concealment. The district court disagreed. App. 13. The lower court's view is in accordance with that expressed by the Tenth Circuit panel and the district court in the case at hand. *See* App. 13; F. Supp. at 209-10.

However, that approach was rejected by the Fifth Circuit in *Allan*. It ruled that affirmative acts of concealment need not be separate from the underlying wrong itself. In reaching this conclusion the appellate court relied in part on its prior decision in *Greenhaw v. Lubbock County Beverage Association*, 721 F. 2d at 1030, upholding tolling where the concealing acts were simultaneously intertwined with the substantive *per se* antitrust violation of price fixing. App. 13-14 & n.26.

The Fifth Circuit asserted a two-pronged rationale in support of its approach. First, fraudulent concealment is an equitable doctrine designed to prevent a wrongdoer which conceals its violation from being able to benefit therefrom by raising the statute of limitations as a defense. Given such purpose, it makes no difference when the concealment occurs. App. 15.

Second, it is difficult, if not impossible, to determine whether or not various asserted acts of concealment are independent of the underlying violation. Every concealing act contributes to the success of the offense by protecting it from discovery.[9] Moreover, it would be anoma-

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[9] Indeed, in the context of *per se* antitrust violations such as bidrigging and price fixing, which are subject to criminal (cont'd)

lous to hold that conduct having the same concealing effect in fact has different consequences in law depending on the timing of its occurrence. App. 15-16.

In light of such rationale, the appellate court in *Allan* rejected the district court's holding that false non-collusion affidavits constituted "mere denial" of wrongdoing and so could not legally comprise concealing conduct. It noted that denial may constitute concealment either where the parties have a fiduciary relationship or circumstances make it reasonable for the plaintiff to rely on the defendant's denial. While reliance may not have been reasonable once the highly publicized federal grand jury investigation began, App. 3, 16, it seemingly was reasonable prior thereto.

Applying the preceding approach to the instant case would have led to an outcome contrary to that reached here and in line with the effects of the decisions in *Allan* and *Hendrickson*. In other words, summary judgment would not have been entered against the State of Colorado dismissing its case. The result would have been a far more well-reasoned, principled and workable conclusion than that which was ultimately reached here.[10]

(cont'd) penalties and civil sanctions, prevention of discovery is itself one of the *goals* of the conspiracy. *See, e.g., Hendrickson Bros.*, 840 F. 2d at 1084 (citing *Western Paving*, 833 F. 2d at 881). *See also Allan*, App. 12; *Greenhaw*, 721 F. 2d at 1030. Consequently, it would seem that acts undertaken toward the goal of concealment could never be independent of the violation itself.

[10] This is not to suggest that there would be no difference in case outcome depending on whether the "inherent self-concealment" or "affirmative concealing acts as part of the violation" approach were utilized. In the former situation, the result would be partial summary judgment for the plaintiff on the concealment prong of the equitable tolling doctrine. In other words, if the jury found a bidrigging violation at all, then by (cont'd)

CONCLUSION

The Fifth Circuit's *Allan* decision magnifies exponentially the need for the Supreme Court to grant *certiorari* on the equitable tolling of the federal antitrust statute of limitations pursuant to the doctrine of fraudulent concealment. It is imperative that this Court do so in order to resolve the growing confusion and conflicts besetting the lower federal courts in this increasingly important area.

Of those cases presenting the issue, it is crucial that the Court grant *certiorari* in the instant case, as opposed to *Hendrickson* or, conceivably (assuming *certiorari* is sought), *Allan*. It is in the case at hand that the lower courts have gone furthest astray by requiring proof of affirmative concealing acts independent of the underlying wrong in order to toll the statute. It is here that the most egregious result, dismissal of the state's case, is involved. Consequently, the Court should grant the petition of the State of Colorado for a writ of *certiorari* in this case in order both to clarify the law among the lower federal courts and in order to rectify the erroneous result here.

Respectfully submitted,

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(cont'd) definition the offense had to have been concealed for it to have occurred. *See, e.g., Hendrickson Bros.*, 840 F. 2d at 1084 (citing *Western Paving*, 833 F. 2d at 881). Conversely, in the latter situation, the concealment issue would ordinarily be a fact question for the jury to decide. *See Allan*, App. 21.

APPENDIX

The STATE OF TEXAS,
Plaintiff-Appellant,

v.

ALLAN CONSTRUCTION COMPANY,
INC., et al., Defendants-Appellees.

No. 87-1766.

United States Court of Appeals,
Fifth Circuit.

Aug. 17, 1988.

State brought action against highway contractors for violation of federal antitrust laws by participating in conspiracy to rig construction bids. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., granted summary judgment for contractors on basis of statute of limitations, and State appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) acts taken to conceal wrongful conduct could support claim of fraudulent concealment sufficient to toll limitations period, even if they occurred at time of offense and furthered commission of offense; (2) bid rigging was not inherently self-concealing, and fraudulent concealment of bid rigging scheme was thus required to be proven by evidence of affirmative acts of concealment; and (3) State presented sufficient evidence to raise fact issue on fraudulent concealment.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, KING, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In this antitrust action, the State of Texas alleges that the defendants participated in a scheme to rig the bidding on state highway construction projects. The district court granted summary judgment for defendants, finding that the action was barred by the statute of limitations. The court rejected the State's contention that the statute was tolled by fraudulent concealment, finding that the State's only evidence of concealment, certain acts undertaken at the time of the conspiracy and in its furtherance, could not be considered acts of concealment. Unpersuaded that the doctrine of fraudulent concealment is so limited, we reverse.

I

In October 1980, a federal grand jury in Austin, Texas, began to investigate allegations that construction companies had conspired for several years to fix the bid price for highway construction contracts. According to federal prosecutors, the companies involved in the scheme made secret agreements to inflate their bids and to restrict the number of bidders on each project. As part of the conspiracy, the companies falsely swore in affidavits submitted with each bid that they had taken no action "in restraint of free competitive bidding." The grand jury issued its first indictments in November 1981, naming

twelve contracting firms and ten individuals as conspirators.

Although the criminal prosecution proceeded under federal antitrust and mail fraud statutes, State officials participated in the investigation from its inception. The grand jury heard testimony from officials in the State Highway Department, including Ted Ziller, an engineer responsible for supervising the bidding process. Ziller, along with engineer Bobbie Templeton, also assisted federal prosecutors in gathering information before the grand jury convened, meeting with government attorneys as early as August 1980. At the request of the United States, the Highway Department also provided records pertaining to the State's dealings with particular companies. However, the State Highway Department made no record of which companies were under investigation.

The grand jury proceedings were widely publicized in Texas. In particular, an article printed in the October 7, 1980, edition of the *San Antonio Express News* specifically noted that Allan Construction Company, along with approximately twenty other firms, had been subpoenaed to produce documents related to bidding activities. This article, like many others concerning the investigation, was circulated throughout the Highway Department.

The Texas Attorney General's office also was aware of the investigation even before the grand jury first met. In the summer of 1980, Assistant State Attorney General Katherine Bond spoke with federal prosecutors about the inquiry. Sometime in 1980 or early 1981, the Attorney General's office retained an economist to use bid statistics to identify which firms were involved in bid-rigging. This

effort was unsuccessful, as were the State's requests that federal investigators disclose the identity of suspected contractors.

The grand jury never indicted Allan Construction Company or any of its employees. On April 6, 1982, however, the grand jury returned an indictment against Price Construction Company. Shortly thereafter, an attorney for one of Price's employees provided the State Attorney General's office with a list of those contractors the employee might identify as part of the conspiracy. Allan Construction Company was on that list.

The State had further evidence of Allan's possible involvement in May 1982, when Travis Jenkins, an employee of C. H. Allison Company, signed a sworn statement for the Attorney General's office. In the statement Jenkins said that an Allan employee had agreed on at least one occasion to refrain from bidding on a project as part of the ongoing scheme.

On November 5, 1985, the State filed suit in federal district court against Allan Construction Company and William Allan, Jr., its president during the alleged conspiracy. The complaint alleged that the defendants had violated federal antitrust laws by participating in a conspiracy to rig construction bids. The district court granted summary judgment for defendants on the basis of the statute of limitations. In doing so, the court rejected the State's contention that the statute of limitations had been tolled by the defendants' fraudulent concealment of illegal activity. According to the district court, the State failed to show "affirmative acts of concealment" other than those acts—such as the submission of false affidavits—

done "in furtherance of the conspiracy." The court also concluded that the State failed to show that it had diligently pursued its claims against Allan. In particular, the court found that in light of the Highway Department's involvement in the federal investigation and the *Express News* article naming Allan as a potential suspect, no reasonable jury could conclude that the State did not have adequate inquiry notice of its claim as early as 1980.

II

The parties agree that in the absence of fraudulent concealment, the State's suit is time-barred. An antitrust action must be brought within four years from the date on which it accrues.[1] In a conspiracy action, that period begins with an overt act done pursuant to the conspiracy.[2] The last contract bid in which the State alleges wrongdoing was let on February 18, 1980, but the suit was not filed until November 5, 1985. In order to avoid the statute, then, the State must demonstrate that fraudulent concealment tolled the running of the limitations period until November 5, 1981, at the earliest.

As the district court correctly recognized, a plaintiff may invoke the fraudulent concealment doctrine only by proving two elements: first, "that the defendants concealed the conduct complained of, and second, that [the plaintiff] failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his

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1. *See* Clayton Act § 4B, 15 U.S.C. § 15b.

2. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971)

claim."[3] The district court concluded that the State established neither element in this case. We deal with each element in turn.

A. Acts of Concealment

To prove the first element—that Allan "concealed the conduct complained of"—the State offered evidence that Allan conducted covert meetings, submitted affidavits that falsely denied any collusion, and submitted intentionally high complementary bids to make other inflated bids appear legitimate. If these acts do not suffice to toll the statute, the State argues, then the bid-rigging conspiracy was "inherently self-concealing," thus eliminating the requirement of specific acts of concealment. Because these aspects of the fraudulent concealment doctrine have occasioned confusion in federal courts, we review the cases in some detail.

1. *Self-Concealing Conspiracy.* As most courts have stated the test, the statute of limitations is tolled only if the defendant has engaged in "affirmative acts" of concealment.[4] As we have stated, "Concealment by defendant only by silence is not enough. [The defendant] must be

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3. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir.1979), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980).

4. *See Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1302 (9th Cir.1986) (plaintiff must show that defendant "engaged in affirmative conduct that fraudulently concealed the existence of a cause of action"), *cert. denied*, — U.S. —, 107 S.Ct. 279, 93 L.Ed.2d 254 (1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir.1984) (same), *cert. denied*, 470 U.S. 1056, 105 S.Ct. 1765, 84 L.Ed.2d 826 (1985).

guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry."[5]

However, several courts also have stated that if the underlying wrong is "self-concealing," the plaintiff need not show affirmative acts. For example, in a fraud case, *Bailey v. Glover*,[6] the Supreme Court wrote that

> when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing . . . .[7]

This is consistent with the general rule that in a fraud case, the plaintiff need only aver the underlying fraud in order to toll the statute of limitations until such time as the plaintiff had some notice of the wrong; fraud is, by its very nature, self-concealing.[8] We recognized the distinction in *Prather v. Neva Paperbacks, Inc.*,[9] a case in which

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5. *Crummer Co. v. Du Pont*, 255 F.2d 425, 432 (5th Cir.) (quoting *Arkansas Natural Gas Co. v. Sartor*, 78 F.2d 924, 929 (5th Cir. 1935)), *cert. denied*, 358 U.S. 884, 79 S.Ct. 119, 3 L.Ed.2d 113 (1958); *see also Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 143, 25 L.Ed. 807 (1879) (same).

6. 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1875).

7. *Id.* at 349-50 (emphasis added).

8. *See, e.g., Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir.1968) ("The original fraud is regarded as a continuing affirmative act, and mere silence of the defendant is treated as concealment."), *cert. denied*, 394 U.S. 987, 89 S.Ct. 1468, 22 L.Ed.2d 763 (1969); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946) (noting that where plaintiff has been diligent in pursuing fraud claim, statute is tolled even though there have been no acts of concealment).

9. 446 F.2d 338 (5th Cir.1971).

the plaintiff sought to apply the fraudulent concealment doctrine to a copyright infringement action. We stated that "[the fraudulent concealment] doctrine, which is applicable to any cause of action, should not be confused with the doctrine applicable where the gist of the action itself is fraud, and the concealment is inherent in the fraud."[10]

Other circuits have held that the "self-concealment" notion may extend to wrongs that are not based in fraud, but which contain an element of deception. In *Hobson v. Wilson*,[11] the plaintiffs alleged that FBI agents had infringed on their first amendment rights by disseminating false information about the plaintiffs' political affiliations. The D.C. Circuit held that a wrong is "self-concealing" for the purpose of fraudulent concealment if "the deception, misrepresentation, trick or contrivance is a necessary step in carrying out the illegal act" rather than "separate from the illegal act and intended only to cover up the act."[12] Because secrecy and deception were essential to the disinformation scheme alleged in *Hobson*, the court found that summary judgment for defendants on the statute of limitations issue was inappropriate.

A few examples illustrate the D.C. Circuit's "self-concealment" analysis. To steal an antique vase is not a self-concealing wrong; the true owner knows the vase is stolen even if the owner does not know the identity of the thief. On the other hand, to sell a fake vase as if it were

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10. *Id.* at 341 n. 2 (citing *Holmberg*).

11. 737 F.2d 1 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985).

12. *Id.* at 33 n. 102.

an antique is not only fraud, it is a self-concealing wrong. Deception is an essential element of the wrong, and one that is not intended merely to cover up the wrong itself. By contrast, to steal a vase and to replace it with a worthless replica is not self-concealing. The wrong is theft of the vase; the replacement is an act separate from the wrong itself and aimed only at concealing the fact that the real vase has been stolen.

Having the benefit of *Hobson's* analysis, two other circuit courts have considered whether a bid-rigging conspiracy may be "self-concealing" where the plaintiffs' claim is based on the antitrust laws. In an opinion later vacated by the en banc court, *Colorado v. Western Paving Construction Co.*,[13] a panel of the Tenth Circuit dealt with allegations of bid-rigging conspiracy quite similar to those in this case. The panel first rejected the argument that submission of false affidavits or other denials of wrongdoing could constitute "affirmative acts" of concealment.[14] The court also excluded from consideration deceptive acts committed in furtherance of the conspiracy itself, such as the submission of complementary bids to make the inflated "low" bid appear competitive. In the panel's words, "Acts that are part of the original wrong, while

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13. 833 F.2d 867 (10th Cir.1987), *panel opinion vacated and district court decision aff'd by an equally divided court*, 841 F.2d 1025 (1988) (en banc).

14. *See Western Paving*, 833 F.2d at 876 (quoting *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155 (10th Cir.1981) (mere denial of wrongdoing cannot be an act of concealment), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982)).

they may conceal the wrong, are not acts of concealment; they are acts of perpetration."[15]

Nevertheless, the *Western Paving* panel held that the bid-rigging conspiracy could be "self-concealing," thus eliminating the need for plaintiff to demonstrate affirmative acts of concealment:

> If a bidrigging conspiracy exists, it must remain concealed to be successful. Any knowledge of the conspiracy would lead plaintiff to seek action immediately and result in collapse of the conspiracy. Furthermore, unlike many conspiracies, a bidrigging conspiracy is likely to exist for an extended period of time. To be attractive to all bidders, the conspiracy must cover more than one job—or must provide some quid pro quo to the "losing" bidders. The very nature of a bidrigging conspiracy makes it likely that future bids will also be rigged. . . . These additional bidrigging activities not only provide the compensation for one of the "losing" bidders in the original bid but also help to conceal the bidrigging activity on the other bids. Such subsequent fraudulent acts may in themselves amount to affirmative acts of concealment. In any event they show that a bidrigging conspiracy, if it exists at all, is *per se* self-concealing.[16]

The Second Circuit adopted this reasoning in another bid-rigging case, *New York v. Hendrickson Brothers, Inc.*[17] Relying on *Hobson,* the court also noted that the submission of a rigged bid was similar to the sale of a fake antique vase: the bid purports to be something it is not, a price

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15. *Western Paving,* 833 F.2d at 877.

16. *Id.* at 881 (citation omitted).

17. 840 F.2d 1065, 1084 (2d Cir.1988).

that is the result of competition rather than collusion.[18] For these reasons, the court concluded that "proof of the conspiracy itself sufficed to prove concealment by the co-conspirators."[19]

Although we accept the D.C. Circuit's definition of a "self-concealing" wrong—that is, one in which deception is an essential element for some purpose other than merely to cover up the act—we do not agree with the Second Circuit that antitrust violations arising from a bid-rigging conspiracy are always self-concealing.[20] It is

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18. *Id.* at 1083.

19. *Id.* at 1084.

20. We are careful to note, however, that the consequences of classifying a wrong as "self-concealing" will be different in this circuit than in the D.C. Circuit. In *Hobson,* the D.C. Circuit held that when a wrong is self-concealing, the burden shifts to the defendant to demonstrate plaintiff's lack of diligence. *See Hobson,* 737 F.2d at 35. It is settled in our circuit, on the other hand, that even where the plaintiff has shown affirmative acts of concealment, the plaintiff bears the burden of showing his diligence. *See Beef Industry,* 600 F.2d at 1169 ("[A]n antitrust plaintiff must shown that . . . he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim."), 1171 ("The plaintiffs bear the ultimate burden of persuasion on the fraudulent concealment issue."). Hence, to classify a wrong as self-concealing relieves the plaintiff only of the burden of demonstrating affirmative acts; it does not lessen the plaintiff's burden of proving reasonable diligence.

Curiously, it is also not clear that the D.C. Circuit would agree that plaintiff need not prove affirmative acts where the wrong is "self-concealing." Although in *Hobson* the D.C. Circuit classified the wrong as "self-concealing," the court did not seem to conclude that affirmative acts of concealment were irrelevant. Indeed, in deciding that the wrong was self-concealing, the court mentioned the "affirmative efforts" of concealment that justified tolling the statute, such as destruction of incriminating documents and false authorship of pub-

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true of any price-fixing conspiracy that "it must remain concealed to be successful."[21] Because price-fixing is illegal, public knowledge of the activity usually ends the agreement. This deceptive aspect of the conspiracy is, in the words of *Hobson*, intended solely to "cover up" the illegal act. Nor is bid-rigging unique because it must "exist for an extended period of time.[22] Every cartel seeks to reap monopoly profits for as long as possible, and because a cartel must limit output, its members have to distribute fewer sales among themselves. We cannot see how this aspect of a bid-rigging conspiracy makes it more deceptive than any other price-fixing conspiracy.

We also are unpersuaded by the Second Circuit's additional argument that bid-rigging is self-concealing because a rigged bid purports to be competitive when in fact it is collusive. Any price charged for a product or service, whether in the form of a bid or otherwise, purports to be competitive at least insofar as it purports to be lawful. In short, we cannot conclude that Congress, in writing the Clayton Act's four-year statute of limitations, could have intended for the fraudulent concealment doctrine to apply to every price-fixing case. Hence, we reject the State's contention that because the bid-rigging conspiracy was in-

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lications. *See Hobson*, 737 F.2d at 36-37. The D.C. Circuit thus may consider the "self-concealment" label important only insofar as it affects the plaintiff's burden of proof on the issue of diligence; in other words, it may be that in the D.C. Circuit's view, even self-concealing conspiracies must contain affirmative acts of concealment. As our discussion in text indicates, we do not share this view.

21. *Western Paving*, 833 F.2d at 881.

22. *Id.*

herently self-concealing, it need not prove affirmative acts of concealment.

2. *Affirmative Acts.* The State argues that even if the conspiracy was not "self-concealing," there were sufficient affirmative acts of concealment to toll the statute. According to the State, these included the submission of false affidavits, efforts to protect the secrecy of bidding negotiations, and submission of intentionally high bids to legitimate lower but collusive bids. The district court rejected the argument, finding that "these acts are the acts which were allegedly done in furtherance of the conspiracy, but do not constitute affirmative acts of concealment." This point of view is in accord with the Tenth Circuit panel's conclusion in *Western Paving*, that "acts of perpetration" cannot be counted as "acts of concealment."[23]

In this circuit, however, we never have held that the acts that demonstrate fraudulent concealment must be wholly separate from the acts underlying the wrong itself. Indeed, in *Greenhaw v. Lubbock County Beverage Ass'n*,[24] we upheld a jury finding of fraudulent concealment where the acts of concealment were intertwined with the acts of price fixing. We wrote:

> The retailers argue that no evidence indicated concealment. We are unpersuaded. There was evidence

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23. *Western Paving*, 833 F.2d at 877; *see also Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F.Supp. 885, 888 (M.D.Penn. 1985) ("[F]raudulent concealment consists of affirmative acts independent of the underlying conspiracy.").

24. 721 F.2d 1019 (5th Cir.1983). A later panel disapproved of *Greenhaw* as to an aspect other than its fraudulent-concealment analysis in *International Woodworkers v. Champion International*, 790 F.2d 1174, 1181 (5th Cir.1986).

> of secret agreements and covert price-setting sessions. The concealment comports with common sense. Such activities are normally concealed, especially in light of the criminal and civil penalties that may result if they are discovered.[25]

Hence, while we did not conclude that the conspiracy in *Greenhaw* was "self-concealing," we held that evidence of efforts aimed at keeping the price-fixing activities secret, even if undertaken at the time of the conspiracy, could count as proof of fraudulent concealment.[26]

Refusing to allow affirmative acts that further a conspiracy to support a finding of fraudulent concealment rests upon a view of the equitable doctrine of tolling that we find unacceptable. This view may be stated simply: Congress outlawed a conspiracy in restraint of trade and set a period of four years within which suits for injury from such a conspiracy must be brought. A conspiracy includes an agreement to achieve the illegal end and includes acts that further that agreement. Hence, acts that are part of the conspiracy cannot serve to "extend" the four year period because Congress requires that suits claiming injury for such a conspiracy be brought within that time; to consider acts in furtherance as acts of concealment alters the period of limitation intended by Congress.

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25. *Id.* at 1030.

26. *Accord* 2 Areeda & Turner, *Antitrust Law* ¶ 325d, at 124 ("[T]he limitation period is tolled by secret conspiracies, such as most clear-cut price-fixing agreements, which are not only created and maintained outside of the public eye, but in which elaborate efforts are taken by the participants to disguise the activity.").

Although the argument has some force, we find it unpersuasive for two reasons. First, this "tidy" view of distinct spheres for offense, limitations and equitable tolling misperceives the doctrine of equitable tolling. Through the statute of limitations Congress has chosen to confer on an accused wrongdoer the benefit of repose once the limitations period has passed. However, the equitable doctrine of fraudulent concealment recognizes that this benefit should not be available to a wrongdoer who takes undue advantage of the statute by attempting to conceal his conduct.[27] The fact that that such concealment occurs at the time of the wrong itself rather than afterwards does not make the wrongdoer any more deserving of the statute's protection.

Second, as "tidy" as the proposed approach may seem, we cannot imagine a principled way to determine what acts of concealment are "independent" from the underlying wrong. We are not persuaded that the distinction turns on whether the act of concealment "furthered" the wrong; every act of concealment furthers the success of the offense by stalling its detection. Likewise, to consider only those acts of concealment completed subsequent in time to the wrong would lead to indefensible results. For example, if Allan employees had shredded incriminating books and records the day before the last bid was let, this act would surely be pertinent to the fraudulent-concealment inquiry, but under the district court's approach we would be bound

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27. *See Bailey*, 88 U.S. at 349 (stating that to permit the defendant to conceal his wrong "until such time as the party committing the fraud to plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure").

to ignore it. It is true that because almost every price-fixing conspiracy involves some efforts aimed at secrecy, our rejection of a requirement that "acts of concealment" be independent of the conspiracy may make it easier to prove fraudulent concealment in antitrust cases. Nevertheless, no other approach is better principled or more workable.

We also disagree with the district court's holding that on the summary judgment evidence before the court, Allan's submission of affidavits of denial could not, as a matter of law, constitute acts of concealment. It is true that, generally speaking, denial of wrongdoing is no more an act of concealment than is silence.[28] Nevertheless, many courts have recognized, and so now do we, that a denial may constitute concealment where the parties are in a fiduciary relationship, or where the circumstances indicate that it was reasonable for the plaintiff to rely on defendant's denial.[29] While it is unlikely that the State's reliance on the affidavits could have been reasonable once the federal investigation began, the district court should at least consider the argument on remand.

B. Diligence

Even where a defendant has concealed wrongful conduct, the statute of limitations is tolled only until such time as the plaintiff, exercising reasonble diligence, could

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28. *See Crummer,* 255 F.2d at 432.

29. *See Berkson,* 743 F.2d at 56; *Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir.1978); *King & King,* 657 F.2d at 1155.

have discovered the facts forming the basis for the claim.[30] Moreover, the plaintiff need not have actual knowledge of such facts; "[t]hose who have learned of facts 'calculated to excite inquiry' must inquire."[31] The district court here concluded that because the State knew in 1980 that Allan's records had been subpoenaed by federal prosecutors, the State is chargeable with knowledge that it had an antitrust claim against the company.

However, as we explained in *Beef Industry*, even though a plaintiff might have inquiry notice of a potential claim, it does not necessarily follow that reasonable diligence will discover sufficient facts to support legal action. In *Beef Industry*, for example, the district court held on summary judgment that plaintiffs were not entitled to tolling by fraudulent concealment because they had not been diligent in pursuing their claim. The court found that the plaintiffs had sufficient notice because a nearly identical antitrust claim against the same defendants had been filed several years earlier in California.[32]

Although we agreed with the district court that the plaintiffs could be charged with knowledge of the allegations in the California case, we did not agree that failure to file suit on the basis of such information necessarily established a lack of due diligence for the purpose of summary judgment.

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30. *See Beef Industry*, 600 F.2d at 1170; *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975).

31. *Beef Industry*, 600 F.2d at 1171; *see also Prather*, 446 F.2d at 341.

32. *See Beef Industry*, 600 F.2d at 1169-70.

> Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather v. Neva Paperbacks, Inc.*, 5 Cir.1971, 446 F.2d 338, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it." Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[33]

We emphasized that while the plaintiffs ultimately would bear the burden of persuasion on the question of diligence, in the summary judgment context it was up to defendants "as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit."[34] To justify summary judgment, we concluded, defendants would have had to prove that the plaintiffs had access to information that would independently verify the allegations in the California complaint.[35]

The approach we adopted in *Beef Industry* has not been altered by the Supreme Court's recent refinement

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33. *Id.* at 1171 (emphasis retained; footnote omitted).

34. *Id.*

35. *See id.; see also Hobson*, 737 F.2d at 36 ("[S]imply because a person knows he has been injured by one person does not mean he should be held to know of every other participant.").

of the summary judgment standard, at least insofar as it applies in this case. In *Celotex Corp. v. Catrett*,[36] the Court held that summary judgment is appropriate against a party who has failed to demonstrate the existence of a genuine issue of material fact on an element of the case for which that party bears the burden of proof, even where the party moving for summary judgment has not offered evidence negating the opponent's claim.[37] Here, the State has introduced some evidence of its diligence; the State's attorneys have sworn that they made repeated attempts to obtain information from federal prosecutors in addition to attempting to identify bid-riggers by statistical means. Unless Allan's evidence had been so compelling that no reasonable jury could consider these attempts reasonably diligent, summary judgment was not appropriate even under the standard of *Celotex*.

Allan's evidence was not so strong. It is true that the Highway Department's failure to keep records of the companies about which federal prosecutors inquired indicates less than aggressive diligence about the State's claims. And, on the basis of news accounts, the State is deemed to have been aware in 1980 that Allan's records were subpoenaed by the grand jury.[38] Nevertheless, these facts do not conclusively establish that greater diligence on the State's part would have led to evidence that the

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36. 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

37. *Id.* 106 S.Ct. at 2553-54; *see also James v. Nico Energy Corp.*, 838 F.2d 1365, 1372 (5th Cir.1988).

38. *Cf. Beef Industry*, 600 F.2d at 1170 (plaintiff chargeable with knowledge of matters in the public record); *United Klans of America v. McGovern*, 621 F.2d 152, 154 (5th Cir.1980) (plaintiffs chargeable with knowledge of local news articles).

claim was "well grounded in fact."[39] Indeed, the summary judgment evidence indicated that the State had the first specific evidence supporting its claim in April 1982, when indicted individuals first named Allan as a conspirator. It will be for the jury to determine whether reasonable diligence could have revealed evidence specifically establishing Allan's culpability prior to November 5, 1981.

III

In sum, we hold today that acts taken to conceal wrongful conduct may support a claim of fraudulent concealment even though they occur at the time of the offense and further commission of the offense. We also hold that bid-rigging is not inherently self-concealing; fraudulent concealment of a bid-rigging scheme must be proven by evidence of affirmative acts of concealment. Under this standard, the State has presented sufficient evidence to raise a fact issue on fraudulent concealment. The judgment of the district court is REVERSED.[40] In the event of trial

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39. *See* Fed.R.Civ.P. 11.

40. The state also contends on appeal that the district court erred in dismissing the state's plea for injunctive relief. On this point, the district court did not elaborate its reasons for decision, writing only that, "Plaintiff has failed to allege any continuing conspiracy or illegal conduct." Defendants had not urged the district court to dismiss the injunction request on this basis, so the state never had an opportunity to be heard on the point. Although the district court may well be correct that the state's pleadings are inadequate in this regard, we must vacate the dismissal because plaintiff had no opportunity to convince the court otherwise. *See Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1364-65 (2d Cir. 1985),*aff'd*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); *Powell v. United States*, 849 F.2d 1576, — - — (5th Cir.1988);

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on remand, the issue of fraudulent concealment will be for the jury.[41]

APPENDIX

Sample Jury Instructions in Civil Antitrust Cases Task Force of the Section of Antitrust Law of the American Bar Association, 1987

Pp. G-2-G-5

"Certain Defenses and Exemptions"
Instruction 1

Fraudulent Concealment

Defendant has raised as a defense the statute of limitations. Statutes of limitations require that a person who believes himself to have been injured by the wrongful act of another must bring suit to recover damages caused by

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Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

We also must vacate the district court's dismissal of the state's pendent claims under Texas law; the basis for dismissal was that once the federal claims dropped out, the court lacked subject matter jurisdiction to adjudicate the pendent claims.

41. Our holding can be translated to trial reality by use of the sample jury instructions prepared by the Antitrust Division of the American Bar Association, which we attach as an appendix to this opinion. To these instructions we would add, however, that denial of wrongdoing may constitute an affirmative act of concealment where the denial is made under circumstances indicating that it was reasonable for plaintiff to rely on the denial in failing to discover the wrongful conduct that caused plaintiff's injury. *See* our discussion *supra*, slip opinion at p. 4921, at pp. — - —.

that injury within a certain period of time after that injury occurred.

In this case, plaintiff cannot recover for any injury which occurred prior to [*date X, four years before filing of the complaint*],[1] unless plaintiff brings itself within an exception that is called the doctrine of fraudulent concealment. Plaintiff is asking to recover for injury which it claims began as early as [*specify date*], a date earlier than [*date X*]. In order to establish that the fraudulent concealment doctrine applies and thus recover damages for any injuries that occurred prior to [*date X*], plaintiff must prove each of the following elements by a preponderance of the evidence:

> First, that it did not know of [*describe alleged violation*] until on or after [*date X*] and that it could not have learned of the violation through the exercise of due diligence until after that date;[2] and

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1. The date to be inserted is four years prior to the filing of the complaint, as provided in Section 4B of the Clayton Act, 15 U.S.C. § 15b (1984).

2. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir.1979), *cert. denied*, 449 U.S. 905 [101 S.Ct. 280, 66 L.Ed.2d 137] (1980) (*"Beef Industry"); Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975) (*"Dayco"); Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir.1974).

This instruction will require some tailoring to address the specific allegations made in each case.

It has been held that public proceedings—such as congressional or administrative hearings, private lawsuits or a criminal indictment—may cause the statute to begin to run. *Beef Industry*, 600 F.2d at 1170-71; *Dayco*, 523 F.2d at 394; *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 295-96 (8th Cir.1975), *cert. denied*, 424 U.S. 915 [96 S.Ct. 1116,

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Second, that defendant actively concealed the alleged activities that caused plaintiff's injuries. It is not enough that defendant failed to disclose the alleged activities; plaintiff must also prove that defendant took affirmative steps to prevent plaintiff from learning of those activities.[3]

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47 L.Ed.2d 320] (1976); *In re Shopping [Carts] Antitrust Litigation*, 1982-1 Trade Cas. (CCH) ¶ 64,612 at 73,348 (S.D.N.Y. 1982). It is not necessary that the plaintiff have knowledge, actual or constructive, of all the details of this cause of action. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd.*, 185 F.2d 196, 209 (9th Cir.1950), *cert. denied*, 341 U.S. 912 [71 S.Ct. 620, 95 L.Ed. 1349] (1951). Some courts have held that in conspiracy cases plaintiff's knowledge that he has been injured by apparently unilateral acts of one defendant is not enough to start the statute running. *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 [102 S.Ct. 1038, 71 L.Ed.2d 320] (1982) (*"King v. [sic] King"*); *In re Plywood Antitrust Litigation*, 76 F.R.D. 570, 586 (E.D.La. 1976).

3. *See, e.g., Rutledge*, 576 F.2d at 250; *City of Kansas City v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 [83 S.Ct. 256, 9 L.Ed.2d 171] (1962) *and* 373 U.S. 914 [83 S.Ct. 1297, 10 L.Ed.2d 415] (1963). Mere nondisclosure may be enough if there is a fiduciary duty or other affirmative obligation to make disclosure. *Glazier Steel Corp. v. Toyomenka, Inc.*, 392 F.Supp. 500, 503 (S.D.N.Y.1974). Some courts have said that a conspiracy may be self-concealing so that little or nothing more than underlying conspiratorial acts are necessary. *See King & King*, 657 F.2d at 1156; *Baker v. F & F Investment*, 420 F.2d 1191, 1199 (7th Cir.), *cert. denied*, 400 U.S. 821 [91 S.Ct. 40, 41, 27 L.Ed.2d 49] (1970) (*"Baker"*); *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 at 78,414 (E.D.La.1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir.1983) (*"J. Ray McDermott"*).

Conduct that has been held sufficient to constitute acts of concealment includes holding secret meetings at hotels and private residences, destruction of notes of meetings, making of phone calls from pay phones, submission of bids falsely appearing to be regular, and false execution of noncollusion affi-

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If you find that plaintiff has proven each of these elements, then you may find that the doctrine of fraudulent concealment applies to plaintiff's claim. In that event, the length of time for which plaintiff may recover damages may be expanded to include the earliest injury which you find was suffered by plaintiff.* If you find that plaintiff has failed to prove either of the elements, then you must find that the statute of limitations bars any claim by plaintiff relating to any injury that occurred prior to [*date X*].

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davits. *See, e.g., J. Ray McDermott,* 1980-1 Trade Cas. (CCH) at 78,413-15; *Ohio Valley Electric Corp. v. General Electric Co.,* 244 F.Supp. 914, 922 (S.D.N.Y.1965) *("Ohio Valley Electric"); Illinois v. Sperry Rand Corp.,* 237 F.Supp. 520, 523-24 (N.D. Ill.1965). Most courts that have considered the question have held that denial of wrongdoing is not enough, but there are some indications to the contrary. *See* cases cited in American Bar Association, Section of Antitrust Law, *Antitrust Law Developments* 428 nn. 358, 359 (2d ed. 1984).

Again, the instruction in a particular case should be tailored to deal with the evidence presented.

* Note by the Court: This sentence may assume that once plaintiff shows that defendant fraudulently concealed any part of plaintiff's antitrust injury, plaintiff may recover for all injuries caused by the conspiracy, including those resulting from acts committed more than four years before the time at which reasonable diligence would have discovered evidence to support a claim. A strong argument can be made, however, that there can be no recovery for an injury suffered more than four years before the filing of the complaint or, if fraudulent concealment be proved, four years before the date by which the plaintiff, with reasonable diligence, should have discovered the injury. We express no opinion on the issue, as it is not before us. A district court might use Rule 49, Fed.R.Civ.P. to hedge this legal uncertainty by submitting separate interrogatories for each possible damage period. It follows that the parties should similarly construct their damage models.